No. 14797

United States Court of Appeals
For the Ninth Circuit

MARGURITE L. CONNELL, *Plaintiff-Appellee,*

vs.

EDGAR ROBERT ERRION, also known as E. R. ERRION and BOB ERRION, AMY ERRION, VIOLET KELLERSTRAUS, and C. W. WILLIAMSON, *Defendants-Appellants,*

DWIGHT HOLDORF, OPAL HOLDORF, HOLDORF OYSTER CORPORATION, a Washington Corporation, INAR GLASER, DOROTHY GLASER, KATHERINE GOLD, H. A. DAVENPORT, also known as LEE DAVENPORT, CORA SCOTT, *et al.*, *Defendants.*

APPEAL FROM THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

BRIEF OF APPELLANTS

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THE ARGUS PRESS, SEATTLE

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INDEX

Page

TABLE OF CASES

TEXTBOOKS

STATUTES

RULES

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I.

JURISDICTION

Jurisdiction of the District Court was sought to be obtained upon and under Section 10(b), Section 27 and Section 29(b) of the Securities Exchange Act of 1934. 15 U.S.C., Sect. 78J(b), Sect. 78AA and Sect. 78CC(b), together with Rule X-10b-5 as promulgated by the Securities Exchange Commisison, 17 C.F.R., Sect. 248, 10b-5.

Those statutory provisions and the above rule are set forth in the appendix.

Allegations in the pleadings alleging such jurisdiction are found in paragraphs I and IX of plaintiff's complaint (R. 2,4, Vol. II). These allegations are denied in appellants' answer (R. 46, 47, Vol. II).

Jurisdiction of this court is based upon 28 U.S.C., Sect. 1291 and 1294. Final judgment was entered January 17th, 1955 (R. 140A, Vol. II). Timely motion for judgment notwithstanding judgment and in the alternative for a new trial was filed January 26th, 1955 (R. 141, Vol. II). Order denying defendants' motion for judgment notwithstanding judgment and in the alternative for a new trial was entered February 9th, 1955 (R. 142, Vol. II). Notice of appeal and bond for costs on appeal were filed with the District Court March 9th, 1955 (R. 144, 145, 146, Vol. II).

II.

STATEMENT OF THE CASE

This is an action for damages, together with rescission of certain instruments, predicated upon matters which were alleged to have been contrary to the Securities Exchange Act of 1934 and the Rules of the Securities and Exchange Commission promulgated thereunder.

Plaintiff was and is now a resident of Seattle, Washington (R. 2, Vol. II) and defendants, E. R. Errion, Amy Errion, C. W. Williamson, and Violet Kellerstraus, appellants herein, were and at all times mentioned are now residents of the State of Oregon (R. 2, 47, Vol. II).

The complaint is extremely voluminous and it would

be a burden upon the court to quote at length therefrom. It appears in Volume II of the record and takes up the first thirty four pages thereof. Suffice it to say for the present that the complaint alleges that prior to October 19th, 1949, plaintiff was the owner of certain properties (all of which she denominates as securities) having a total approximate value of $118,000.00 (R. 6, Vol. II); that defendants made certain false representations; and that relying upon such representations on or about October 19th, 1949, plaintiff transferred all of her "securities" to defendants for and in consideration of receiving from defendants 125 acres of tideland situated in Coos Bay, Oregon, of a value of less than $12,500.00 (R. 15, Vol. II).

The prayer of plaintiff's complaint asks for rescission and cancellation of certain instruments and for a money judgment for fraud and deceit against the defendants in the total amount of $73,576.37 to be increased annually by some $3,500.00 per year.

On November 10th, 1953 (the complaint having been filed August 29th, 1953, and service being had upon all appellants except appellant Violet Kellerstraus) appellants, E. R. Errion, Amy Errion, and C. W. Williamson, together with other defendants, filed a motion to dismiss plaintiff's complaint on the grounds that the complaint did not state facts sufficient to constitute a cause of action; that it did not support a cause of action under the Securities Exchange Act of 1934 and that the action was barred by the statute of limitations (R. 40, 41, Vol. II). Order denying motions to dismiss was entered February 5th, 1954 (R. 45, 45, Vol. II).

The action having been set for trial for November 3rd, 1954, on September 1st, 1954, Stanley Soderland, the then attorney for all of the defendants except defendants Glaser, filed notice of withdrawal (R. 74, Vol. II). By written order this withdrawal was approved by the District Court October 1st, 1954 (R. 83, 84, Vol. II).

On October 27th, 1954, present counsel for appellants entered notice of appearance for appellants E. R. Errion, Amy Errion, C. W. Williamson and two other defendants who were subsequently dismissed from the action (R. 91, Vol. II), and on the same day filed motion to vacate trial setting and for continuance (R. 94, Vol. II). The motion to vacate and for a continuance was supported by affidavid of counsel (R. 92, Vol. II) and by the affidavit of Herman A. Dickel, M.D., and Blair Holcomb, M.D. (R. 95, 96, Vol. II).

On October 22nd, 1954, John H. Collacutt, a deputy sheriff, of the County of Multnomah, State of Oregon, filed return of personal service upon defendant Violet Kellerstraus (R. 86, Vol. II). On November 3rd, 1954, present counsel for appellants entered a special appearance and motion to quash service in behalf of Violet Kellerstraus upon the ground that she was not personally served with process and the court lacked jurisdiction over her person. Affidavits in support of the motion were filed (R. 103, 104, Vol. II).

During the course of the trial the court took oral evidence upon the question of the service alleged to have been made upon Violet Kellerstraus (R. 5, 21-562). During this testimony the deputy sheriff conceded that

his return of service was false; that he had not made personal service upon Violet Kellerstraus and sought to uphold his service by substituted service upon Fred Errion (R. 554).

Appellant, Violet Kellerstraus' motion to quash service and to dismiss was denied (R. 1066 ,R. 108, Vol. II).

Shortly after the beginning of the trial, on November 3rd, 1954, counsel for defendants, E. R. Errion, C. W. Williamson, Bones and Cora Scott, renewed his motion for continuance of the action predicated upon the inability of the principal defendant, E. R. Errion, to be present in court to testify and supported that motion by the testimony of Herman A. Dickel, M.D., a physician practicing in Portland, Oregon, and specializing in the practice of psychiatry. The motion was denied (R. 85, 86).

The trial in the District Court consumed seven trial days. Plaintiff called twenty-one (21) witnesses and either read from or introduced five depositions. Insofar as this appeal is concerned plaintiff's two principal witnesses were plaintiff, herself, and defendant, Dwight Holdorf.

Plaintiff's testimony was substantially in accord with the allegations of her complaint as permitted by the court to be amended respecting the sale of her securities, and throughout the testimony she sought to place the entire onus upon defendant, E. R. Errion. Briefly, plaintiff testified that the transactions upon which she sought relief occurred in the fall of 1949 and that all of her dealings were principally and primarily with de-

fendant, E. R. Errion. There was admitted in evidence, however, as defendants' Exhibit A3 (R. 830) a promissory note dated September 12th, 1949, payable to plaintiff's order in the amount of $24,624.11 and signed "E. R. Errion." Plaintiff admitted that her signature appeared upon the back of the note (R. 201). (The above sum represented the sale price of plaintiff's securities). Plaintiff also admitted that in March of 1952 in another action she had testified in a deposition that the only transaction she had with defendant, E. R. Errion, was to loan him between $20,000.00 and $30,000.00 for which she received a promissory note; that thereafter this note, together with other properties, was turned over, not to Errion, but to the Holdorf Oyster Corporation in exchange for tide lands (R. 204-211).

Plaintiff also admitted on cross-examination that she put her signature upon a receipt which was signed by the Holdorf Oyster Corporation and indicated the list of plaintiff's properties which were turned over by plaintiff to the Holdorf Oyster Corporation. The receipt, a copy of which was originally introduced as defendants' Exhibit A-4 (R. 216) was later admitted in evidence as defendants' A-5 (R. 244). It was dated October 19th, 1949. Plaintiff admitted that on the deposition previously referred to she had testified that all of the documents signed by her were delivered to defendant, Dwight Holdorf, in behalf of the Holdorf Oyster Company, and that that was true and correct (R. 239).

Defendant, Dwight Holdorf, called as a witness by

plaintiff, also sought to place the entire onus and burden upon defendant, E. R. Errion. It would not be helpful to the court to relate Holdorf's testimony in detail, principally because he was completely and wholly impeached on each and every statement made by him on the witness stand. Pages 73 to 922 of the record contain a detailed resume of impeaching statements made by Holdorf at the time of the taking of his deposition in this action, to-wit, January 30th, 1954.

The Trial Court in his oral decision following the trial and on December 29th, 1954, conceded that the testimony of plaintiff had been impeached (R. 1075) and stated unequivocably that Dwight Holdorf's testimony is not to be relied upon because it was certainly impeached (R. 1076).

Insofar as appellants, Amy Errion, C. W. Williamson and Violet Kellerstraus are concerned, each participated in only a minute portion of the entire transaction and Williamson and Kellerstraus had nothing whatsoever to do with the transaction until long after the transfer of any of plaintiff's property or the receipt by plaintiff of any oyster lands in consideration therefor.

The only actions of defendant, Amy Errion, were respecting the sale of plaintiff's corporate securities which she testified was a loan transaction between the plaintiff and E. R. Errion (R. 96); the testimony of plaintiff that Amy Errion did some typing for her (R. 161), and the fact that Amy Errion and Mrs. Connell, plaintiff, in 1950 took a trip to Southern California (R. 117).

Amy Errion testified unequivocably that she was acting for plaintiff in the sale of plaintiff's stock in September of 1949; that she had no knowledge of any of the other transactions testified to by plaintiff; that she had typed none of the papers or documents for plaintiff and in 1949, 1950, 1951 did not participate personally in any of her husband's business affairs (R. 1014, 1015).

Respecting appellant, C. W. Williamson, the only manner in which he could conceivably be connected with the matters testified to by plaintiff was in connection with the subsequent lease of the oyster lands from Mrs. Connell to Williamson. The lease was dated December 14th, 1950, and was admitted in evidence as plaintiff's Exhibit 4 (R. 134). Williamson's testimony concerning that transaction appears commencing at page 1025 of the record.

The only connection which could conceivably be alleged as far as defendant, Violet Kellerstraus, is concerned is that she is the sister of E. R. Errion and that she had the record title to one of the pieces of plaintiff's property in her name at the time it was sold in 1953, June 5th, 1953, to be exact. Violet Kellerstraus testified that she had merely done what defendant, Dwight Holdorf, had asked her to do and had not discussed the transaction in any respect with her brother, E. R. Errion (R. 585).

Ruling of District Court

In addition to the rulings made during the course of the trial and which have previously been referred to, at the conclusion of plaintiff's case defendants Errion

and wife, Williamson, Cora Scott and Bones, renewed their challenge to the jurisdiction of the court and challenged the sufficiency of the evidence. At the same time the motion in support of the special appearance to quash service upon defendant, Violet Kellerstraus, was renewed. The District Court granted the motion to dismiss as to the defendants, Bones and Scott, and denied the remainder of the motions without prejudice (R. 1010).

At the conclusion of all of the evidence counsel for appellants renewed their motion for continuance upon the ground and for the reason that the principal defendant, E. R. Errion, was unable to be present (R. 1056) which motion was denied by the District Court (R. 1057).

Likewise at this time counsel for appellants renewed the motion for dismissal and challenge to the evidence in favor of defendants, Errion, Amy Errion and Williamson (R. 1060). The court reserved decisions upon these motions (R. 1060).

On December 29th, 1954, the District Court heard argument and thereafter granted the motion for dismissal on behalf of defendant, Glaser, denied the remaining motions and directed that judgment be entered in favor of plaintiff and against appellants and the other defendants (R. 1065-1079).

Findings of fact, conclusions of law, and final judgment were signed and entered January 17th, 1955 (R. 107, 140A, Vol. II). Order denying defendants' motion for judgment notwithstanding judgment and in the alternative for a new trial was entered February 9th, 1955 (R. 142, Vol. II).

QUESTIONS INVOLVED

As a result of the District Court's rulings in denying appellants' motions for continuance, and denying the motion of defendant, Violet Kellerstraus, to quash service of summons upon her, in overruling appellants' respective challenges to the sufficiency of the evidence, and in entering judgment against appellants, the following questions are presented to this court for determination:

1. Whether the Securities Exchange Act of 1934 and Rule X-10 B-5 of the Securities and Exchange Commission confers jurisdiction upon the United States District Court for the Western District of Washington over appellants, each of whom were and are residents of the State of Oregon.

2. Whether plaintiff's cause of action predicated upon an alleged fraudulent transfer of property in October, 1949, is barred by the statute of limitations.

3. Whether the judgment of February 17th, 1955, is supported by the findings of fact and conclusions of law as to appellants and each of them.

4. Whether the findings of fact and conclusions of law are supported by the evidence as to appellants and each of them.

5. Whether the United States District Court abused its discretion in denying appellants' motion to vacate the trial setting and for a continuance.

6. Whether the United States District Court erred in denying the motion of defendant, Violet Kellerstraus to quash service of summons.

III.

SPECIFICATION OF ERRORS

The District Court erred:

1. In holding that the District Court had jurisdiction of these appellants under the Securities Exchange Act of 1934 and Rule X-10 B-5 of the Securities and Exchange Commission, and in overruling appellants' objections to the jurisdiction of the District Court.

2. In holding that plaintiff's cause of action was not barred by the statute of limitations and in overruling appellants' objections that the action was not commenced within the time limited by law.

3. In entering judgment against appellant, E. R. Errion.

4. In entering judgment against appellant, Amy Errion.

5. In entering judgment against appellant, C. W. Williamson.

6. In entering judgment against appellant, Violet Kellerstraus.

7. In entering judgment against appellants and each of them for the reason that said judgment as to appellants and each of them is not supported by the findings of fact, conclusions of law or the evidence in this action.

8. In entering Findings of Fact No. IX insofar as it refers to an alleged fraudulent transaction with defendant, E. R. Errion.

9. In entering Finding of Fact No. X insofar as it relates to an alleged single transaction with E. R.

Errion, insofar as said finding refers to the promissory note of September 12th, 1949, as being considered by plaintiff as a receipt, insofar as it refers to participation by Amy Errion in any of the transactions therein set forth and insofar as the court finds that there was only one single and indivisible transaction and that appellant, E. R. Errion, participated in any extent beyond the issuance of his promissory note of September 12th, 1949.

10. In entering Findings of Fact No. XI, XII, XIII and XIV insofar as they relate to defendant, E. R. Errion.

11. In entering Finding of Fact No. XV insofar as it relates to alleged untrue statements of material fact made by defendant, E. R. Errion.

12. In entering Finding of Fact No. XVI insofar as it relates to alleged untrue representations as to the future and/or promises alleged to have been made by defendant, E. R. Errion.

13. In entering Finding of Fact No. XVII insofar as it relates to alleged omissions to state material facts alleged to have been omitted by defendant, E. R. Errion.

14. In entering findings of fact No. IX and XX insofar as it is found that defendant, E. R. Errion, persuaded plaintiff not to go to Coos Bay, Oregon, to refrain from discussing her transactions with others and permitted plaintiff to continue to live rent free in her home in Seattle.

15. In entering Finding of Fact No. XXI insofar as

it is found that defendant, E. R. Errion, arranged for defendant, Amy Errion and plaintiff to visit and travel in California in 1950 insofar as it is found that the purpose of said trip and visit was to hinder plaintiff and insofar as it is found that these facts were well known to defendant, Amy Errion.

16. In entering Finding of Fact No. XXIII insofar as it relates to action and representations of defendant, E. R. Errion, together with knowledge of defendant, Amy Errion, in respect to the lease dated December 14th, 1950, and insofar as it relates to knowledge of C. W. Williamson respecting the alleged purpose of said lease.

17. In entering Finding of Fact No. XXIV insofar as it respects actions and directions of defendant, E. R. Errion.

18. In entering Finding of Fact No. XXV insofar as it relates to defendant, Violet Kellerstraus, and her actions as an alleged part of a scheme to defraud plaintiff, together with the knowledge alleged to have been had by Violet Kellerstraus of such transactions.

19. In entering Finding of Fact No. XXVII insofar as it relates to alleged representations and inducements made by defendant, E. R. Errion, and plaintiff's alleged reliance thereupon.

20. In entering Finding of Fact No. XXVIII insofar as it relates to the purpose and intent of each and all of appellants, and insofar as it relates to plaintiff's knowledge of the transaction and discovery of the facts thereof.

21. In entering Finding of Fact No. XXIX insofar as it relates to the use of the mails, instrumentalities of Interstate Commerce and facilities of a National Security Exchange by appellants.

22. In entering Finding of Fact No. XXX insofar as it relates to transfer of property to E. R. Errion and action by appellants in disposing of plaintiff's securities and other property.

23. In entering Finding of Fact No. XXXI insofar as it relates to alleged knowledge of appellants and each of them and their alleged acting in concert and tacit agreement to defraud plaintiff and violate the Securities Exchange Act of 1934 and the rules and regulations of the Securities and Exchange Commission.

24. In entering Finding of Fact No. XXXII insofar as it provides for a money judgment against appellants and each of them.

25. In entering Findings of Fact No. XXXIV, XXV and XXXVI insofar as they relate to transactions with any of appellants.

26. In entering Conclusion of Law No. 1 insofar as it holds that appellants or any one of them by their conduct and contracts violated the Securities Exchange Act of 1934 and the rules and regulations of the Securities Exchange Commission.

27. In entering Conclusion of Law No. 3 insofar as judgment was directed to be rendered against appellants and each of them.

28. In overruling and denying appellants' motion to vacate the trial setting and for a continuance.

29. In overruling and denying the motion of defendant, Violet Kellerstraus, to quash service of summons upon her.

30. In denying appellants' motion for judgment notwithstanding the judgment and in the alternative for a new trial.

IV.

SUMMARY OF ARGUMENT

Appellants' argument upon this appeal will be presented under four principal subdivisions as follows:

1. The District Court lacked jurisdiction over appellants and each of them and over plaintiff's alleged cause of action against appellants for the reason that plaintiff did not establish that any act or transaction constituting a violation of the Securities Exchange Act of 1934 or any rule of the Commission promulgated thereunder occurred within the jurisdiction of the United States District Court for the Western District of Washington. It is appellants' contention that the only securities of plaintiff involved in any of the testimony was her corporate stock which was turned over to E. R. Errion in the nature of a loan and represented by a promissory note signed by Errion, September 12th, 1949 (defendants' Exhibit A-3). It is not established by the evidence that this transaction took place within the jurisdiction of the United States District Court for the Western District of Washington. Thereafter in an entirely separate and divisible transaction plaintiff transferred certain of her properties, including the promissory note, to the Holdorf Oyster Corporation.

2. The transfer of plaintiff's properties took place in August, September and October, 1949, being finally consummated October 19th, 1949, as shown by defendants' Exhibit A-5. Plaintiff's complaint was not filed until August 31st, 1953. Plaintiff did not establish by credible evidence that she failed to discover the fraud worked upon her until some time subsequent to January 1st, 1951, as alleged in her complaint, for under the applicable law the statute of limitations on a fraud action begins to run when the fraud should have been discovered, and a clue to the fact, which if followed up diligently, would lead to discovery is in law equivalent to discovery. The action is barred by the statute of limitations.

3. The judgment of February 17th, 1955, as to each of appellants is not, and the respective findings of fact as to each of the appellants are not supported by the evidence. As to defendants, Amy Errion, C. W. Williamson and Violet Kellerstraus, there is no evidence whatsoever to establish their participation in or knowledge of any fraudulent scheme to an extent which would justify the judgment of the District Court. As to defendant, E. R. Errion, the judgment must of necessity rest upon the testimony of plaintiff and the testimony of defendant, Dwight Holdorf. The testimony of each was completely impeached in all substantial particulars and thus cannot support a judgment against this defendant. If there were fraud, which we deny, plaintiff is in "pari-delicto" with defendants and thus cannot recover.

4. It was a grievous and material abuse of discretion

for the District Court to deny to appellants and particularly to appellant, E. R. Errion, the motion for a vacation of the trial setting and for a continuance. It is abundantly apparent from the language in plaintiff's complaint and even more apparent from the testimony of plaintiff and defendant, Dwight Holdorf, together with others testifying in behalf of plaintiff, that a studied and concerted effort was made to place the entire onus of the matters complained of by plaintiff upon defendant, E. R. Errion. E. R. Errion, through no fault of his own, and by reason of grievous illness, was unable to appear and defend himself. The testimony of Dr. Herman A. Dickel is undisputed and uncontroverted and for the court to deny the motions to vacate the trial setting and for a continuance was an abuse of discretion as to all of appellants.

5. No proper service was had upon defendant, Violet Kellerstraus. The affidavit of personal service filed by the deputy sheriff of Multnomah County was admittedly false and the court lacked jurisdiction of this defendant.

Before commencing a detailed argument upon each of the above five subdivisions, we feel compelled to state candidly that we shall make no attempt to present argument respecting each and all of the findings to which we have assigned error. Plaintiff submitted and the District Court signed thirty-six (36) separate findings of fact. They appear in the record at pages 107 to 140 inclusive. In order to protect our record, we have felt it necessary to assign error to twenty-four (24) of such findings and to three conclusions of law. To even

attempt a detailed discussion of these findings and conclusions, together with the evidence relating thereto would extend this brief beyond conceivable reason. We believe, however, that the various matters assigned as error will be adequately covered in the argument to be presented and we do not intend to waive any assignment of error.

V.

ARGUMENT

1. The District Court Lacked Jurisdiction over Appellants and each of Them and over Plaintiff's Alleged Cause of Action Against Appellants for the Reason That Plaintiff Did Not Establish that Any Act or Transaction Constituting a Violation of the Securities Exchange Act of 1934 or any Rule of the Commission Promulgated Thereunder Occurred within the Jurisdiction of the United States District Court for the Western District of Washington.

Plaintiff has sought to obtain jurisdiction of the United States District Court for the Western District of Washington under and pursuant to Section 10b, Section 27 and Section 29b of the Securities Exchange Act of 1934, together with Rule X-10b -5 as promulgated by the Securities and Exchange Commission. Inasmuch as each of appellants was and is a resident of the State of Oregon, the jurisdiction, if any, therefor, must come within the purport and language of Section 27 of the act and it must be established that an act or transaction constituting a violation of the Securities Exchange Act of 1934 or Rule X 10b-5 occurred within the jurisdiction of the United States District Court for the Western District of Washington.

While it is undisputed that on September 12th, 1949, certain corporate stock of the plaintiff in a loan transaction was turned over to E. R. Errion and sold on the stock exchange, no fraud is alleged or established respecting such transaction. It is not contended that the stock was sold for a lesser value than its market value and in fact the proof is exactly to the contrary.

In point of fact it is not even established in the evidence that this transaction as between E. R. Errion and plaintiff even occurred within the jurisdiction of the United States Court for the Western District of Washington.

Thereafter, in an entirely separate transaction, plaintiff turned over to defendant, Dwight Holdorf, acting for the Holdorf Oyster Corporation the said promissory note and deeds to certain of her properties together with other personal properties (R. 239). None of the properties involved with the possible remote exception of the promissory note could be classified as securities within the meaning of the act.

The very language of the act as analyzed by this court in the case of *Fratt v. Robinson,* 203 F.(2d) 627 (C.A. 9, 1953) indicates that the purpose of the act was to control security transactions by regulation of security-transfer businesses and persons who function in or through them. As this court said in referring to the reasoning of other United States courts, "There is one phase common to the reasoning of all the cases: Section 10 is in aid of the end sought by the act, to-wit, the lessening of fraudulent and sharp practices in the securities market."

Nowhere in the congressional record is there any evidence or even hint that Congress meant to reach such activities as alleged in Plaintiff's complaint. Security transactions on the exchanges and acts directly related thereto were the practices Congress intended to reach by the Securities Exchange Act of 1934.

Not only does Section 10(b) of the act and Rule X-10b-5 thereunder not have the extremely broad application plaintiff believes it does, but its application has been restricted even in matters primarily concerning dealings in securities. *Joseph v. Farnsworth Radio & Television Corp.,* 99 F.Supp. 701 (D.C., S.D., N.Y., 1951), involved the attempt to recover from defendants the difference between what plaintiffs paid for stock in the corporate defendant and that which they would have paid had the defendants not remained mute while selling their stock in the company because of knowledge of its precarious plight. District Judge Sugarman, in dismissing the complaint for failure to state a cause of action, stated:

> "Nothing in the history of the Act or the Rule (X-10 (5)-5) permits the far-reaching effect sought herein by the plaintiffs * * * "

This decision was affirmed in *Joseph v. Farnsworth Radio & Television Corp.,* 198 F.(2d) 883 (2 C.C.A. 1952).

A note on "Purchase of Securities by 'Any Person'," 44 Ill. L. Rev. 841 (1950) concludes that the sanctions of the Exchange Act and Rule X-10b-5 "still apply only to insiders and broker-dealers."

Plaintiff's complaint alleges that she was the owner of certain properties including corporate securities on

October 19th, 1949, and on that day transferred all of her properties to defendants (R. 6115—Vol. II). Proof of this allegation, of course, failed completely, and even after the trial amendment invited by the trial court (which we felt and do now feel was error) plaintiff did not establish any violation of the act respecting "securities" as defined by the act and which occurred within the jurisdiction of the United States District Court for the Western District of Washington.

Failure to prove an act or transaction occurring within the jurisdiction of the trial court in violation of the Securities Exchange Act of 1934 or the rules of the commission means simply and positively that the court lacked jurisdiction of appellants who were residents of Oregon, and lacked jurisdiction of the subject matter of the action itself.

2. The Relief Sought by Plaintiff Is Predicated Upon the Alleged Damage Occurring to Her by Reason of the Transfer of Her Properties which Transfer Occurred in August, September, and October of 1949. Nothing which Took Place Following October of 1949 Gave Rise to Any Cause of Action, and Plaintiff's Cause of Action, if any, Was Complete Certainly by October 29th, 1949. It Is Barred, Therefore, by the Statute of Limitations.

Since the federal act provides no limitation, the applicable statute of limitations is the statute of the State of Oregon or the statutes of the State of Washington. The applicable Oregon statute of limitations covering relief on the ground of fraud is two years. Oregon Rev. Statutes 12.110.

The applicable Washington statute covering relief predicated upon fraud is three years. Rem. Rev. Stat. Sec. 159 (4).

Each statute provides that the cause of action in such a case shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting fraud. Ore. Rev. Stat. 12.110; Rem. Rev. Stat. 159 (4).

Plaintiff's action was not commenced until the filing of her complaint August 31st, 1953, which was almost four years from the time her properties had been transferred.

In the relatively late case of *In re Sackman's Estate,* 34 Wn.(2d) 864, 210 P.(2d) 682, the Washington Supreme Court held that the three-year Washington statute for actions based on fraud begins to run when the fact which, if followed up diligently, would lead to discovery, is in law equivalent to discovery. The court further held that the mere fact that one may have confidence in a relative or relatives (even more applicable to a stranger) does not in and of itself establish a fiduciary relation and is not sufficient to excuse a lack of diligence in investigating to discover fraud.

Plaintiff now contends that the promissory note of September 12th, 1949, was thought by her to be a receipt and not a note. Apparently she discussed her affairs with others and most anyone of even subnormal intelligence could have explained to her what the document was, so too with the other facts relied upon by plaintiff. Any diligence upon her part would have disclosed specific information concerning the oyster lands

around Coos Bay, the title thereto and if necessary, the history of such oyster lands, together with all other facts concerning the transaction.

We respectfully submit that plaintiff's testimony that she did not discover the alleged fraud until some time subsequent to December of 1950 is absolutely incredible.

Assuming the transactions to be fraudulent as contended for by plaintiff, certainly she must in law be deemed to have discovered the fraud prior to August of 1950 (applying the Washington statute) and beyond any question of doubt, prior to August of 1951 (applying the Oregon statute).

This action as against each and all of appellants is barred by the statute of limitations.

In this connection it is worthy of note that the District Court in finding No. 28 (R. 134, Vol. II) merely recites that plaintiff did not discover or have any reason to discover facts that revealed to her that she had been defrauded until well within three years from the time she commenced the action. This finding is not only not supported by the evidence, but is insufficient to sustain the judgment.

3. The Judgment of February 17th, 1955, As to Each of Appellants Is Not and the Respective Findings of Fact As to Each of the Appellants Are Not Supported by the Evidence.

Plaintiff's action for relief is upon the ground of fraud and the Washington and Oregon law relative to common law fraud is applicable.

The fact that plaintiff has endeavored to invoke the

jurisdiction of the federal courts pursuant to the Securities Exchange Act of 1934 does not change the nature of her action. The action is one for relief predicated upon common law fraud and this court has so held in the case of *Fratt v. Robinson,* 203 F.(2d) 627 (C.A. 9, 1953). In that case appellees contended that the two-year statute of limitations applied, in that the action arose out of a statute. In answering that contention this court said:

> "In a sense, of course, the instant action is based upon a statute, but it is also based upon fraud which has been the subject of common law concern through the centuries. And, of course, the Washington state law recognizes such an action. The authors of 53 C.J.S., Limitations of Actions, Sect. 83 (a), at page 1052, have deduced the following from the authorities:
>
> " * * *
>
> " 'The prase "liability created by statute" or "liability created by law," within the meaning of such a statute, has been held not to include or extend to actions arising under the common law, * * * .'
>
> "Appellees argue that the basis of the federal statute is the use of the mails or other instrumentality of interstate commerce, therefore the action arises from a statute and the two-year limitation applies. But, of course, the use of the mails *per se* is not denounced, it is the fraud that offends. For that reason, it denies the use of the mails in connection with the fraud. Here is not a governmental statutory denouncement of a human action heretofore undenounced, such as a violation of a wartime price for a commodity. Fraud is denounced in all its phases by federal and state and the common

law. There are statutes with restrictions and limitations as to actions under it, but such actions do not arise out of nor upon a statute, within the meaning of the Washington state law. To hold otherwise would be paying tribute to form inconsistent with the spirit and substance of the rule.

"What we have said appears to be borne out by the Washington State Supreme Court in the case of *Union Trust Co. v. Amery,* 1912, 67 Wash. 1, 120 P. 539, 540. That action was based upon a Washington statute which declared unlawful, among other acts, the making of any division of the stock of a corporation except from profits. It was claimed by defendants that the statute of limitations had run. The court thought otherwise, and held the applicable limitation was that provided for actions based upon fraud."

In *Melton v. United Retail Merchants,* 24 Wn.(2d) 145, 163 P.(2d) 619, the Supreme Court of the State of Washington said:

"If there be such presumptions as are relied on by respondent, which we gravely doubt, they must certainly give way to the ancient and familiar rule —or rather, maxim, for it is so classified in the law books—that: 'Fraud is never presumed, but must be proved.' The Roman version is perhaps the better, for in two less words, it not only states the maxim, but also the reason on which it is based *'Fraus est odiosa et non pro sumenda'* (Fraud is odious and not to be presumed).

" 'It follows from the rule that fraud will not be presumed that the burden of proving fraud rests on the party who relies on it either for the purpose of attack or defense.

" 'The rules which impose the burden of proof

> on one alleging fraud and which deny a presumption of fraud rest on the fact that fraud is regarded as criminal in its essence, and involves moral turpitude at least, while, on the other hand, the presumption is that all men are honest, that individuals deal fairly and honestly, that private transactions are fair and regular, and that participants act in honesty and good faith. The presumption is against the existence of fraud and in favor of innocence, *the presumption against fraud approximating in strength the presumption of innocence of crime* * * * (Emphasis supplied by the court) 37 C.J.S. 398, Fraud, Sec. 95."

In *Cerckonek v. Dibble,* 42 Wn.(2d) 451, 256 P.(2d) 488, the Washington Supreme Court said:

> "And we have repeatedly held that the burden is upon the person who alleges fraud to establish it by evidence that is clear, cogent and convincing." (Citing cases.)

The Oregon rule is almost identical. See *Miller et ux. v. Protrka, et ux.,* 193 Ore. 585, 238 P.(2d) 753, together with the case of *Metropolitan Casualty Insurance Co. v. Lesher,* 152 Ore. 161, 52 P.(2d) 1133, wherein many Oregon decisions on the burden of proof in fraud cases are reviewed and the court quoted from the case of *Wimer v. Smith,* 22 Ore. 469, 30 Pac. 416, as follows:

> "On a charge of fraud, the burden of proof is on the party alleging it. The defendants must clearly and distinctly prove the fraud or false representations they allege. The law in no case presumes fraud. The presumption is always in favor of innocence, and not guilt. Fraud must be proved, but it may be proved by circumstances from which no other inference but that of fraud can be drawn.

> The rule is, that when proven by circumstances, they must afford a strong presumption. (*Juzan v. Toulmin,* 9 Ala. 662; S.C. 44 Am. Dec. 448.) Circumstances of mere suspicion will not warrant the conclusion of fraud. (*Taylor v. Fleet,* 4 Barb. 95; *Clarke v. White,* 12 Pet. 178.) 'The evidence of it,' Chancellor Kent said, 'must be clear, strong, and satisfactory.' (*Boyd v. Mclean,* 1 John's Ch. 582; *Gillespie v. Moon,* 2 id. 585.) And so likewise said the learned and eminent Dillon J., in *Geib v. Ins. Co.,* 1 Dill, C.C. 443. In no doubtful manner does the court lean to the conclusion of fraud; it is not to be assumed on doubtful evidence. If the fraud is not clearly and strictly proved as alleged, relief cannot be had, although the party against whom relief is sought may not have been perfectly clear in his dealings. (*Mowatt v. Blake,* 31 L.T. 387.) The facts constituting fraud must be clearly and conclusively be proved by the preponderance of the testimony * * * " (Citing texts)

The leading Washington decision upon the necessary elements of fraud is *Webster v. Romano Engineering Corp.,* 178 Wash. 118, 34 P.(2d) 428 which has been cited with approval in numerous later Washington decisions including the case of *Dobbin v. Pacific Coast Coal Co.,* 25 Wn.(2d) 190, 170 P.(2d) 642, wherein the court said:

> "Of all civil liabilities, fraud is the most difficult to establish."

The Oregon rule is identical. See *Counzelmann v. N.W.P. & D. Prod. Co.,* 190 Or. 332, 225 P.(2d) 757, and *Musgrave et ux. v. Lucas et ux.,* 193 Or. 401, 238 P.(2d) 780.

With the foregoing principles of law in mind, let us

briefly examine the evidence in support of the judgment and the several findings as to each of the appellants.

(A) *Evidence as to Amy Errion.*

The only evidence as to Amy Errion consists in Mrs. Connell's testimony that Amy was present in her home on numerous occasions and did some typing for her in connection with her business (denied by Amy Errion); that Amy Errion accompanied Mrs. Connell to California in 1950 which is undisputed (there is not one word in the testimony which would give rise to any inference therefrom); that Amy Errion sold Mrs. Connell's corporate securities in September of 1949 (which related solely to the separate and distinct promissory note transaction); and the fact that she was the wife of E. R. Errion. The latter fact seems to have been of primary importance to the trial court in his decision as appears on page 1072 of the record.

It will be readily seen that none of the testimony relating to Amy Errion comes with the rulings of the Washington and Oregon courts insofar as fraud actions are concerned.

(B) *C. W. Williamson*

The only testimony relating to appellant, Williamson, is in connection with the lease of December, 1950. There is no showing whatsoever that he had any knowledge of the transfer of plaintiff's properties to anyone, or that he had any connection whatsoever with any of the matters testified to by plaintiff until more than a year after all of the properties had been transferred.

As we have previously stated the gravamen of plaintiff's action is fraud in inducing her to transfer her properties in the fall of 1949, and once again, it is exactly contrary to the rules as established by the Washington and Oregon courts to hold appellant, Williamson, liable in this action.

(C) *Violet Kellerstraus*

Violet Kellerstraus is the sister of E. R. Errion. Her apartment adjoins his in Portland. For a time they had a joint bank account and at the request of defendant, Holdorf, the title to one of the properties originally belonging to plaintiff was placed in Violet Kellerstraus' name and later sold by her. The actual sale took place in 1953.

Once again, unless we are to presume fraud and to ignore the requirements as established by the courts of both Washington and Oregon, we cannot find Violet Kellerstraus guilty of fraud in this action. There is not one word of testimony that she had any part or knowledge in inducing plaintiff to dispose of her properties in the slightest particular.

(D) *E. R. Errion*

If this judgment is to be sustained against appellant, E. R. Errion, it must necessarily be upon the testimony of plaintiff and the testimony of defendant, Dwight Holdorf. The testimony of neither was "clear, cogent and convincing."

Despite her studied endeavor at the time of trial to place the entire blame for anything which occurred upon defendant, Errion, we respectfully submit that

her testimony falls far short of the required clarity and credibility in that she was impeached on almost every important item of her testimony.

The court will recall that plaintiff testified upon an earlier deposition in another action that her entire dealings were with the Holdorf Oyster Corporation and Dwight Holdorf with the exception of one transaction with Errion wherein she loaned him some twenty-four-odd thousand dollars and took his promissory note for it (R. 204-211). Obviously this is the corporate stock loan transaction in August and September of 1949 and under plaintiff's testimony alone the judgment cannot he supported against Errion.

Dwight Holdorf's testimony is even less convincing. In the trial of a very considerable number of civil cases over the past twenty years, the writer of this brief does not recall ever observing a witness who was more completely impeached than was defendant Dwight Holdorf. In order to save the time of the court in a trial which had already been unduly extended, and by stipulation of counsel, we merely read from his deposition the impeaching statements made by him at that time and did not follow the usual procedure of reading each statement and then asking the witness if he so testified. Notwithstanding this, however, 49 pages of the record consist of this impeaching testimony (R. 873-922).

It is clearly apparent by now, that from the commencement of this action plaintiff has made a studied and deliberate effort to vilify defendant E. R. Errion, commencing with the language used throughout her complaint, the numerous affidavits filed during the

pendency of the action, and in a deliberate attempt throughout the trial of plaintiff and her witnesses to place the entire blame upon him. This animosity is clearly indicated by the witness Bynon, who testified that she worked for Mr. Errion for some six months, left his employ at 3:00 o'clock in the afternoon of a given day in June of 1949 and met with representatives of the Attorney General's office immediately thereafter (R. 395).

Despite all of this and as previously stated, the judgment against E. R. Errion must rest upon the testimony of plaintiff and defendant Dwight Holdorf. The character of that testimony is not such as to sustain this judgment.

A further ground for reversal of the judgment as against each and every one of the appellants is the situation which, by plaintiff's own testimony and pleadings puts her in *pari-delicto* with at least one of the appellants. The undisputed testimony is that plaintiff and E. R. Errion attempted to "fix" the value of Coos Bay oyster lands in an admitted attempt to defraud the Port of Coos Bay out of $150,000.00. When we say undisputed testimony we mean in this connection the testimony of Mrs. Connell, if taken at its face value. She testified that she expected to receive a profit on this transaction. We submit therefore that the case of *Paddock v. Todd,* 37 Wn.(2d) 711, 225 P.(2d) 876, is directly in point. In that case the Washington court said:

> "Concerning respondent's cross-appeal, little need be said. It is very clear that the trial court, in exercise of its equitable powers, was entirely correct in refusing respondent any relief upon his

cross-complaint for the reason that both appellant and respondent knowingly entered into a conspiracy to obtain money from Anacortes Veneer, Inc., by falsely representing that appellant was a bona fide stockholder and, as such, entitled to employment under the rules and regulations of the company. *Under these circumstances, the parties being in pari delicto, a court of equity will not aid either party in carrying out their fradulent conspiracy.* 2 Pomeroy's Equity Jurisprudence (5th ed.) 134, Sect. 402f."

4. It Was a Grievous and Material Abuse of Discretion for the District Court to Deny to Appellants and Particularly to Appellant, E. R. Errion, the Motion for Vacation of the Trial Setting and for a Continuance.

As we previously indicated, plaintiff, her witnesses and defendant Holdorf, acted in concert together throughout the trial to place the entire onus and blame upon the defendant E. R. Errion.

E. R. Errion was the only witness who could testify in his own behalf. His absence from the trial was testified to by Dr. Herman A. Dickel whose testimony was unimpeached and uncontroverted. Timely motions were made for continuance prior to trial at the commencement and at the conclusion of the trial, and it was an abuse of discretion for the court to deny these motions.

In *Harran, et al. v. Morgenthau,* 89 F.(2d) 863 (App. D.C. 1937), the Federal court said:

"If there were anything in this record challenging the good faith of the motion for continuance, the professional ability or character or truthfulness of the physicians who made affidavit to the

inability of Dunning to appear or even if there were a showing that a continuance would have resulted in serious loss to the other parties, we should not now hesitate to sustain the action of the lower court; but here we are confronted with a case in which, as appears, the plaintiff was his only witness and was so seriously ill that his appearance in court would probably have resulted in his death. Insisting upon a trial in these circumstances must necessarily have resulted in prejudice to Dunning's rights. There may have been good reasons for the refusal to grant the continuance, but if there were it was the duty of counsel to have shown them by the record, for we can know only what the record contains.

"We believe the universal rule in circumstances such as we have outlined above is to reverse the judgment or decree and remand the case for a new trial. Cases so holding, among others too numerous to mention are the following:" (Citing cases)

See also *Elliott v. Lawson,* 87 Ore. 450, 170 Pac. 925; *In re Townsend's Estate,* 122 Ia. 246, 97 N.W. 1108; *McCutcheon's Adm'r. v. Dean,* 246 Ky. 257, 54 S.W. (2d) 926; *Karkorian v. Fermanian,* 189 N.Y.S. 130, and *State v. Harras,* 22 Wash. 57, 60 Pac. 58. In the latter case, though upon a different set of facts, the language of the court is particularly important. The Washington Supreme Court said:

"If the defendant has been deprived of the right to make a defense through no failure or neglect of his own, it would be a shame and a reproach to the law to hold him accountable for the law's mistake. The case involves something more than a mere question of the exercise of discretion by the trial judge in refusing an application for a continu-

ance. It involves the larger question of a defendant's right to have witnesses examined in his behalf. It involves the constitutional right of fair trial. No duty which the courts owe society can rise above that of preserving inviolate those principles which make effective the constitutional guarantee of a fair trial. Better, far better, that the course of justice be slow, then that in making haste we should break down those safeguards which experience has shown to be necessary for the welfare and protection of the rights of the citizen."

5. No Proper Service Was Had Upon Defendant Violet Kellerstraus and the Court Therefore Lacked Jurisdiction over Her Person.

Plaintiff sought to obtain jurisdiction over defendant Violet Kellerstraus, by an affidavit setting forth personal service upon her in Portland, Oregon. This affidavit being controverted and the court having taken oral testimony in relation thereto, it clearly and unequivocably appeared that the affidavit was false in all particulars, and that no personal or proper substituted service was had upon this defendant.

For this reason and regardless of everything else said in this brief respecting defendant Violet Kellerstraus, the judgment against her must be reversed by reason of the lack of competent service.

CONCLUSION

We respectfully submit that the court lacked jurisdiction over these defendants and this cause of action; that the action was not commenced within the time limited by law; that the evidence wholly fails to support the judgment and the findings of fact as to each of the appellants; that the court abused its discretion in denying the motion for vacation of trial setting and for a continuance; and that the court lacked personal jurisdiction over defendant Violet Kellerstraus.

For the reasons above set forth in this brief, the judgment should be reversed.

Respectfully submitted,

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APPENDIX

STATUTES AND RULE INVOLVED

Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. Sect. 78j(b), provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange
>
> * * *
>
> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules, and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Rule X-10B-5 promulgated by the Commission under Section 10(b), 17 C.F.R. Sect. 240.10b-5, provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrucentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,
>
> (1) to employ any device, scheme, or artifice to defraud,
>
> (2) to make any untrue statement of a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,
>
> in connection with the purchase or sale of any security.

Section 27 of the Act, 15 U.S.C. Sect. 78aa, provides:

> The district courts of the United States, the Supreme Court of the District of Columbia, and the United States Courts of any Territory or other places subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this title or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this title or the rules and regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this title or rules and regulations thereunder, or to enjoin any violation of such title or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found.

Section 29(b) of the Act, 15 U.S.C. Sect. 78cc(b), provides:

> Every contract made in violation of any provision of this title or of any rule or regulation thereunder, and every contract (including any contract for listing a security on an exchange) heretofore or hereafter made the performance of which involves the violation of, or the continuance of any relationship or practice in violation of any provision of this title or any rule or regulation thereunder, shall be void (1) as regards the rights of any person who, in violation of any such provision, rule, or regulation, shall have made or engaged in the performance of any such contract, and (2) as

regards the rights of any person who, not being a party to such contract, shall have acquired any right thereunder with actual knowledge of the facts by reason of which the making or performance of such contract was in violation of any such provision, rule, or regulation: * * *

No. 14797

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MARGUERITE L. CONNELL,

Plaintiff - Appellee,

-vs-

EDGAR ROBERT ERRION, also known as E. R. Errion and Bob Errion, AMY ERRION, VIOLET KELLERSTRASS and C. W. WILLIAMSON,

Defendants - Appellants,

DWIGHT HOLDORF, OPAL HOLDORF, HOLDORF OYSTER CORPORATION, a Washington Corporation, INAR GLASER, DOROTHY GLASER, KATHERINE GOLD, H. A. DAVENPORT, also known as Lee Davenport, CORA SCOTT, et al,

Defendants.

Appeal from the United States District Court, Western District of Washington, Northern Division

BRIEF OF APPELLEE

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I N D E X

TABLE OF AUTHORITIES

TEXTBOOKS

STATUTES

RULES

Because Appellants devoted their "Statement of the Case" more to the chronological events of the litigation than to the facts upon which the Court found that they had conspired to perpetrate a scheme upon Appellee to fraudulently induce her to sell to them $124,180.09 worth of securities and other property for a deed to 125 acres of almost worthless tideland in Coos Bay, Ore., Appellee believes it appropriate to make her own "Statement of the Case". Appellee (hereafter called Mrs. Connell) is here defending the $83,077.49 judgment which the Court below awarded to her on January 17, 1955. (T. 140, Vol 2)

APPELLEE'S STATEMENT OF THE CASE

The trial Court found that Appellants (together with non-appealing defendants) conspired with each other in the perpetration of a fraudulent scheme upon Mrs. Connell in violation of Sec. 10(b) of the Securities and Exchange Act of 1934 (15 USC Sec. 78j(b)) and Rule X-10B-5 of the Securities and Exchange Commission (17 C.F.R. Sec. 240.10b-5). (T. 135, Vol. 2)

Here is a concise statement of the facts that constituted the scheme:

THE SCHEME -- Its Conspirators and Victim

Mrs. Connell was the victim. She resides in Seattle, Washington and has been a widow since 1946. In 1949 she was 74 years of age. She is now eighty.

Appellant conspirators include: E. R. Errion (hereinafter called "Errion"), a little over 50 years of age and a resident of Independence and/or Portland, Oregon. Errion's wife, Amy Errion, likewise is an Oregon resident. Violet Kellerstrass , a 41 year old unmarried sister of E. R. Errion is a resident of Portland, Oregon. C. W. Williamson resides in Salem, Oregon.

The other conspirators were the defendants who have not appealed from this judgment, namely: Dwight Holdorf and his wife, Opal Holdorf, who spent considerable time in Oregon but were residents of Washington, and the Holdorf Oyster Corporation, organized under the laws of the State of Washington.

THE SCHEME -- Its Inducement Phase

In the early part of 1949 Mrs. Connell first met Errion when he called at her Seattle home at the instance of a Mr. Davenport whom Mrs. Connell had met in Portland during the Christmas holidays of 1948. At that time Errion called to see if he could help her sell her two large homes in Seattle of which she was anxious to dispose. (T. 106).

Several months later in the early summer of 1949, Errion again called at Mrs. Connell's home and presented to her a "plan" which later developed into a sale of her securities and other property valued at $124,180.09 to Errion in exchange for 125 acres of tidelands in Coos Bay, Ore. The so-called "plan" was represented to Mrs. Connell in the following general respect:

Errion said he had large holdings of "Oyster" land in Coos Bay, Ore.; that he had held them for a long time and that they were worth $2,000.00 but more conservatively $1,200.00 per acre. (T. 110) He said that in the Fall of 1949 it was expected that the Port of Coos Bay would condemn his holdings of "Oyster" land and that it was necessary for him to 'establish values" of said land by selling some of it to others before the condemnation action was commenced (T. 112). Errion further explained that the "establishment of values" was particularly necessary because although the land was well worth $1,200.00 per acre, there had been so few sales of such land that its true value couldn't be established unless he sold some of it at its true value prior to commencement of condemnation. The "plan" of Errion was for Mrs. Connell to sell to him all of her securities and other property for the "Oyster" land valued at $1,200.00 per acre - representing $150,000.00 in exchange for her securities and other properties worth $124,180.09 and such would be conclusive evidence estab-

lishing the true value of the "Oyster" land at $1,200.00 per acre. Errion pointed out that the transaction would also establish the true value of the adjacent "Oyster" land holdings of his own and that as a result, he as well as Mrs. Connell would benefit. (T. 112).

When Mrs. Connell remonstrated about acquiring any kind of land or entering into any kind of a business - much less the "Oyster" business - Errion represented that because the Port of Coos Bay would shortly be condemning the land for Port expansion which land the Port sorely needed, it would be required to purchase this "Oyster" land for the value as established at $1,200.00 per acre with the consequence that within the year Mrs. Connell would, if she purchased the "Oyster" land which she didn't want, end up with $150,000.00 in cash which she did want. (T. 109).

In presenting this so-called "plan" as part of the fraudulent scheme, Errion made several untrue statements of material facts (T. 118, Vol. 2); made untrue representations as to the future as well as promises which at the time they were made were not intended to be kept (T. 120, Vol. 2); and omitted to state material facts necessary in order to make the statements made to Mrs. Connell, in the light of the circumstances under which they were made, not misleading. (T. 121, Vol. 2)

THE SCHEME -- Its principal transaction

Relying upon the misrepresentations, false promises and misleading statements of fact, Mrs. Connell between August 22, 1949 and October 19, 1949 sold the following securities and other property, having a total value of $124,180.09 in exchange for a deed to 125 acres of tidelands in Coos Bay, Oreg. worth not more than $12,500.00 (T. 110, Vol. 2):

(a) 54 shares, California Packing Corporation
195 shares, The Borden Company
92 shares, Standard Oil of California
25 shares, General Motors Corporation
60 shares, Portland General Electric
50 shares, State Street Investment Co.
500 shares, Affiliated Funds
Total value $24,624.11

(b) Earned but unpaid dividends in cash on above securities at time of sale - 122.61

(c) The "Kalland" promissory note (maturity exceeding nine months) unpaid balance and value 915.30

(d) Annuity insurance policy having face value of $30,000.00 but an actual value at time of sale 25,000.00

(e) The "Bogardus" contract, being a conditional sales contract of real property in Seattle, Washington held by Mrs. Connell and having at time of sale an unpaid amount and value of 3,023.08

(f) The "Rankin" contract, being a conditional sales contract upon real estate in Seattle, Washington held by Mrs. Connell and having an unpaid balance and value of 7,955.71

(g) The "Johnson" contract, being a conditional sales contract on real estate in Seattle, Washington held by Mrs. Connell and having an unpaid balance and value of 640.00

(h) Mrs. Connell's home at 2812 Mt. St. Helens Place, Seattle, Washington, value 45,000.00

(i) Improved residential property at 811 14th Avenue North, Seattle, Wash. of a value of $25,000.00 but incumbered with a first mortgage having an existing unpaid balance of $8,106.22 and an equity at time of sale of 16,893.78

TOTAL $124,130.09

Mrs. Connell at all times understood that she was engaged in a single transaction with Errion wherein she was selling her above described securities and other property to Errion in exchange for 125 acres of oyster land in Coos Bay, Ore. valued at $1,200.00 per acre and she relied upon Errion to so effect such transaction. This transaction was consummated in the following manner and under the direction of Errion but with the participation and assistance of Amy Errion, Dwight Holdorf, Opal Holdorf and Holdorf Oyster Corporation. (T. 112, Vol. 2).

First, on August 22, 1949 Mrs. Connell deeded her two parcels of residential property in Seattle, Wash. to Dwight and Opal Holdorf. (Ex. 42).

Second, on September 8, 1949 Mrs. Connell delivered to Errion the above listed corporate securities

whereupon Amy Errion with written consent of Errion sold such securities on her own account at Merrill, Lynch, Fenner & Beane at Seattle Wash., giving the proceeds to her husband and keeping for herself a subsequent $122.61 dividend check. (T. 94, 97, Ex. 65, 66, 67). On September 12, 1949 Errion gave to Mrs. Connell his one year promissory note in amount of $24,624.11 which Mrs. Connell considered and treated as a receipt for the shares of corporate stock, pending delivery to her of the promised "Oyster" land.

Third, between August 22, and October 19, 1949 Mrs. Connell transferred the "Kalland" note (maturity exceeding nine months); the annuity insurance policy; the three conditional sales contracts upon real property in Seattle to the Holdorf Oyster Corporation. (Ex. A-5).

Fourth, on October 19, 1949 Dwight Holdorf presented to Mrs. Connell a receipt document dated at "Seattle, Washington" (Exh. A-5) receipting for all of the above described securities and property, excluding the described corporate securities but including the promissory note of Errion in amount of $24,624.11, dated September 12, 1949 for and in consideration of a deed to 125 acres of land in Coos Bay, Ore. The receipt document was signed by the Holdorf Oyster Corporation and by Mrs. Connell. This transaction took place in Mrs. Connell's Seattle home (T. 114, Vol. 2). At this

time Dwight Holdorf received from Mrs. Connell the promissory note of Errion dated September 12, 1949 in amount of $24,624.11, endorsed in blank by Mrs. Connell, together with a second set of deeds to Mrs. Connell's two parcels of residential property naming the Holdorf Oyster Corporation the grantee in each. (Mrs. Connell's deeds on August 22, 1949 had named Dwight Holdorf and Opal Holdorf as grantees). Also, at this time Mrs. Connell received a deed from Holdorf Oyster Corporation to 125 acres of "Oyster" land in Coos Bay, Ore. (Ex. 1)

The Court below not only found that Errion, Amy Errion, Dwight Holdorf and Opal Holdorf each and all knew of the transaction and that its purpose was to defraud Mrs. Connell but also found that there was only one single and indivisible transaction involving the purchase from Mrs. Connell of $124,130.09 worth of her securities and other property for a consideration of $12,500.00 worth of land in Coos Bay, Ore., although as part of the scheme to defraud Mrs. Connell, an attempt was made by Errion and Dwight Holdorf to make the transaction appear on paper as several transactions by use of documents prepared by either Errion or Dwight Holdorf and presented to Mrs. Connell at various times over a six-week period by either Errion or Dwight Holdorf. (T. 114, Vol. 2).

THE SCHEME -- Its conspiratorial phase.

Prior to 1949 Errion organized OYSTER PRODUCERS, INC., a Washington corporation in which was placed 500 acres of tidelands in Coos Bay, Ore. Errion was the true owner of this corporation's stock though he placed the stock in the name of nominal holders. Errion controlled the corporation which was at all times the alter ego of Errion. (T. 115, Vol. 2).

During June or July of 1949 Errion, Dwight Holdorf and Opal Holdorf, together with one Glenn Munkers (who was then holding Errion's stock in Oyster Producers, Inc.) arranged for Oyster Producers, Inc. to deed 500 acres of tidelands to Dwight and Opal Holdorf, the latter giving to the corporation a five year promissory note secured by mortgage to said tidelands in the approximate amount of $800.00 per acre or $400,000.00. For purpose of furnishing public evidence that the land had been bought for $800.00 per acre Errion and Dwight Holdorf affixed Federal Documentary Stamps to the deed in amount sufficient to show the consideration as being $400,000. No cash or other valuable consideration passed. The trial Court found the transaction not to be a bona fide sale of land for $800.00 per acre or any other substantial amount. (T. 116, Vol. 2).

In early October of 1949, Errion, Dwight and Opal Holdorf caused to be organized the Holdorf Oyster

Corporation, a Washington corporation for the express purpose of taking title to tidelands as held by Dwight and Opal Holdorf and to enable the corporation instead of Dwight and Opal Holdorf to convey 125 acres of such tidelands to Mrs. Connell. Again, all the stock in names of Dwight and Opal Holdorf was held by them for Errion, who paid for such and had same endorsed in blank and handed over to him as soon as the corporation had been organized. (T. 676, 684, 790). Dwight and Opal Holdorf, as officers of the corporation, conducted the corporate affairs under direction of Errion with knowledge that the corporate actions were part of the scheme to defraud Mrs. Connell and that, contrary to appearance, the corporation was but the alter ego of Errion. (T. 115, Vol. 2).

That as soon as Holdorf Oyster Corporation was organized in October of 1949, Dwight and Opal Holdorf conveyed 469½ acres of the 500 acres of their tidelands to that corporation in consideration of Holdorf Oyster Corporation assuming the note and mortgage of Oyster Producers, Inc. to the said tidelands. Again, Errion and Dwight Holdorf affixed to the deed Federal Documentary Stamps sufficient in amount to represent that the sale was for a consideration of $800.00 per acre. No cash or other valuable consideration was given by the corporation for the tidelands and the Court found

the transaction was not a bona fide sale but an attempt to establish evidence of false value for the land as part of the scheme to defraud Mrs. Connell. (T. 117, Vol. 2; T. 791-796). From the 469½ acres of tideland which Holdorf Oyster Corporation received, it deeded to Mrs. Connell 125 acres on October 19, 1949; she giving her $124,180.09 of securities and other property to Holdorf Oyster Corporation and/or E. R. Errion in exchange. (Ex. A-5).

The 30½ acres of tidelands which Dwight and Opal Holdorf reserved when conveying the rest of the 500 acres to Holdorf Oyster Corporation, they conveyed on August 24, 1949 to Graham and Edith Skene, victims of the identical type of fraud as practiced on Mrs. Connell in point of time and representations. (T. 792, 720-725).

Appellant Violet Kellerstrass, 41 year old and unmarried sister of Errion lived in an apartment in Portland adjoining the Errion apartment with a companionway connection. (T. 572). Both apartments shared the same telephone (T. 519). She was kept busy receiving telephone calls and messages and writing letters for Errion (T. 470). Violet Kellerstrass maintained a joint bank account with Errion in a Portland bank wherein all money in the account belonged to Errion. (T. 565, 585). In 1949 she opened a safe deposit box in a Vancouver, Washington bank and gave Errion power of attorney to the

box (T. 576). After Mrs. Connell's real property at 811 14th Avenue, Seattle was conveyed to the Holdorf Oyster Corporation in the principal transaction, it was later placed by Errion in the name of his sister, Violet Kellerstrass, to disguise the true ownership which Violet Kellerstrass at the time well knew. (T. 566).

In the early part of 1953, she ostensibly sold the property for $11,400.00 and for purpose of concealing the true recipients of the purchase money forthwith reduced the $11,400.00 to cashier checks at Seattle and in a deliberately confusing series of transactions involving the further exchange of cashier checks she deposited the $11,400.00 in part to the joint account of herself and Errion in a Portland bank and in part to a bank account of Dwight and Opal Holdorf in a Vancouver, Wash. bank. (Study of Ex. 35, 18, 13, 14, 15, 19, 20, 21, 22, 28).

Appellant Amy Errion as wife of Errion was present with Errion in Mrs. Connell's home during some of the transaction; acted as Errion's secretary and typed documents in Mrs. Connell's home in connection with the transaction. (T. 161). She was the person who took Mrs. Connell's corporate securities to the Seattle office of Merrill, Lynch, Fenner & Beane; selling same on her own account with written consent of her husband, Errion (Ex. 65, 66), and then taking the principal proceeds of $24,624.11 and after reducing to cashier checks

at Seattle, turned them over to Errion. Later she received a further check from the brokerage firm for said securities in amount of $122.61 which she deposited in her own Salem, Ore. bank account (Ex. 67). Her further participation will appear in connection with the facts in respect to the "lulling" activities of the scheme.

The conspiratorial activities of Appellant C. W. Williamson is best set forth in narrating the "lulling" activities of the scheme.

THE SCHEME -- Its "lulling" phase.

The very first "lulling" activity in the scheme was on the part of Errion who persuaded Mrs. Connell not to inspect her newly acquired "Oyster" land and to stay away from Coos Bay, Ore. She was also advised not to discuss her transaction with others; particularly lawyers and to await developments. (T. 123, Vol. 2; T. 133).

Another early "lulling" activity of the scheme was to permit her to remain in her home at 2812 Mt. St. Helens Place, Seattle, rent free although the home had been conveyed to Holdorf Oyster Corporation. (T. 123, Vol. 2).

As a further "lulling" activity Errion arranged for Amy Errion and Mrs. Connell to visit and travel in

Southern California commencing in July, 1950. What was intended as a short trip extended to nearly five months and ended just before Christmas of 1950. The Court found that this trip had as its purpose the hindering of Mrs. Connell from discovering the true facts concerning her transaction.(T. 123, Vol. 2).

To further placate Mrs. Connell, the Holdorf Oyster Corporation advanced to her various amounts of money at various times between September, 1950 and April, 1951 in total amount of $4,230.95, taking her promissory notes in return. (T. 124, Vol. 2) These funds came from the sale of her various contracts. (T. 837).

However, the most elaborate "lulling" activity of the scheme came in December of 1950 while Mrs. Connell and Amy Errion were still in Los Angeles. With Amy Errion first advising Mrs. Connell that Errion was arriving with "some fine news" (T. 118) and with Amy present in a Los Angeles motel, Errion arrived on December 14, 1950 and presented to Mrs. Connell an "Indenture of Lease" which had already been executed by C. W. Williamson in Oregon (T.123, Ex. 4). Errion told Mrs. Connell that C. W. Williamson was a man of great wealth from the East who was interested in undertaking the business of cultivating oysters in Coos Bay, Ore. He represented that if Mrs. Connell signed the

"Indenture of Lease" and thus leased her land to C. W. Williamson with an option to purchase, C. W. Williamson would not only cultivate the "Oyster" land and pay her one-third of the profits but that he would also over a twelve year period purchase her 125 acres for $1,200.00 per acre or a total of $150,000.00. At the same time he advised Mrs. Connell for the first time that the Port of Coos Bay had withdrawn its condemnation action against her 125 acres of tideland but added that in the meantime the Port of Coos Bay in dredging the channel had damaged the land and that she had a good cause of action for damages against the Port of Coos Bay which he would prosecute for her and see that she collected a large sum as damages. When Mrs. Connell told Errion she wanted her money while she was alive and not after she was dead, Errion was quick to advise that the "Indenture of Lease" if executed was a security upon which she could take to any bank and borrow a large sum of money (T. 125). Relying on the representations of Errion, Mrs. Connell did not read the "Indenture of Lease" as carefully as she might otherwise have done and she executed it believing it to be as represented by Errion. (T. 124-127, Vol. 2).

The "Indenture of Lease" (Ex. 4), while appearing to be a document as represented by Errion was in truth a document that obligated C. W. Williamson to

purchase over a period of time only $30,000.00 worth of tideland at $1,200.00 per acre. It was also worthless as a security on which to borrow money. In truth, C. W. Williamson was not a man of wealth; came from Salem, Oregon; had no money to purchase such land; had no intention of cultivating the "Oyster" land; had never seen the land and knowingly permitted himself to be used as a "front" for Errion and Dwight Holdorf to further "lull" Mrs. Connell by paying to her thereafter in accordance with the "Indenture of Lease" in a series of semi-annual payments a total of $22,500.00. (T. 126, 133, Vol. 2). This money was passed to C. W. Williamson during 1951, 1952 and the first half of 1953 by Dwight Holdorf, Holdorf Oyster Corporation and National Forest Products, another Washington corporation which was found to be but the alter ego of E. R. Errion. (T. 127, Vol. 2). Each time the money was deposited to the account of C. W. Williamson, part was retained by him and the rest forthwith sent to Mrs. Connell. He personally kept at least $1,700.00 (T. 133, Vol. 2). In June of 1953 C. W. Williamson defaulted in making payments to Mrs. Connell under the "Indenture of Lease" agreement.

Another contemporaneously conducted "lulling" activity in the scheme transpired in July of 1951 when Errion deeded back to Mrs. Connell her home; taking a $16,000.00 note and mortgage which he thereafter

hypothecated to Glaser for $16,000.00 cash. Details are set forth in Finding No. 24 (T. 127, Vol. 2).

THE SCHEME -- Use of Instrumentalities of Interstate Commerce.

In the scheme to defraud Mrs. Connell, Appellants used both directly and indirectly the United States mails (Ex. 33, 54, 79), instrumentalities of interstate commerce (T. 960, 122, 174, Ex. 15, 67) and the facilities of a national securities exchange (T. 960) in violation of Sec. 10(b) of the Securities and Exchange Act and Rule X-10B-5 of the Commission. (T. 134, Vol. 2)

A substantial amount and number of securities were involved in the single indivisible transaction.

Of the $124,180.09 worth of securities and non-securities fraudulently taken from Mrs. Connell, there were included $24,624.11 worth of corporate shares of seven different firms. These were unquestioned securities. The "Kalland" promissory note held by Mrs. Connell with maturity exceeding nine months and having a value of $915.80 was also without question another security. (15 U.S.C. Sec. 78c(10)). Such unquestioned securities represented a substantial and important part of the transaction and should be sufficient to satisfy the Court that the transaction in substance involved securities every bit as much as non-securities.

Only if there is a question about this view do we raise the Federal question and contend that the annuity taken from Mrs. Connell of another $25,000.00 in value and the three conditional sales contracts - "Bogardas", "Rankin" and "Johnson" - aggregating in value $11,623.79 were also securities.

Sec. 3(10) of the Securities and Exchange Act of 1934 (15 U.S.C. Sec. 78c(10)) in defining "securities" includes any instrument "commonly known as a security". The Court should also appreciate that although the Securities Act of 1933 (15 U.S.C. 77c(8)) exempts "annuity contracts" from its operation the 1934 Securities and Exchange Act does not.

A "security" has been defined as a written assurance for return or payment of money; evidence of indebtedness. Penn Co. for Insurance on Lives and Granting Annuities v. United States, (D. Ct., Pa., 1941) 39 F. Supp. 1019, 1021. The term "security" under present usage has a generous scope far beyond its literal meaning. Trenton Cotton Oil Co. v. C.I.R. (6 Cir., 1945) 147 F.2d. 33, 37. The Court is required to look at substance; not form and to adopt a broad concept of the term "security". S.E.C. v. Universal Service Ass'n (7 Cir., 1939) 106 F.2d. 232, 237. S.E.C. v. Bailey (D. Ct., Fla., 1941) 41 F. Supp. 647, 650. It was observed by the court in In Re Astor's Estate (1946) 62

in exchange for the corporate shares and second, 125 acres of "Oyster" land for return of Errion's note and other property, the jurisdiction of the District Court could not be defeated. Errion's note (Ex. A-3) having a maturity in excess of nine months in the second transaction was as much a security as the corporate shares were in the first. 15 U.S.C. Sec. 77c(8).

The District Court had jurisdiction over the cause and parties by reason of Sec. 10(b) of the Securities and Exchange Act of 1934 and Rule X-10B-5 of the Commission.

In spite of the fact that Appellants have not seriously attacked the trial Court's jurisdiction, either here or in the Court below, Appellee feels it her duty to clearly and succinctly show this Court that the District Court had jurisdiction of the cause and parties.

In preliminary, we should point out that Sec. 27 of the Act (15 U.S.C. Sec. 78aa) expressly grants to the District Court "exclusive" jurisdiction over civil causes arising under the Act, together with statutory authority to serve process beyond its territorial boundaries but within the United States. Coburn v. Warner (D. Ct., S.D.N.Y., 1953) 110 F.Supp. 850. However, the "exclusive" jurisdiction granted to the District Court is expressly made as an additional remedy to any other that Mrs. Connell might otherwise have had at law or in equity.

Sec. 29, (15 U.S.C. #78bb). In other words, the Act, in giving the District Court "exclusive" jurisdiction did not pre-empt the field as to causes for fraudulent purchase of securities but merely declared that Mrs. Connell could by choice or necessity forego a common law or equitable remedy and come into the District Court (but no where else) to secure relief for fraud in the purchase of her securities in violation of the Act.

Mrs. Connell in the case at bar came into the Court below and proved that Appellants had conspired in the perpetration of a scheme and device to fraudulently induce her to sell to Appellants in a single indivisible transaction $124,180.09 worth of securities and other property for almost worthless tidelands in Coos Bay, Ore. She alleged and proved misrepresentations, fraudulent promises and omissions of fact that not only established common law fraud but as well a direct violation of Sec. 10(b) of the Securities and Exchange Act of 1934 (15 U.S.C. Sec. 78j) which reads:

> "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange...
>
> "(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public

"interest or for the protection of investors. June 6, 1934, c. 404, Sec. 10, 48 Stat. 891."

and the implementing Rule X-10B-5 of the Securities and Exchange Commission (17 C.F.R. Sec. 240, 10b-5) which reads:

> "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or the mails, or of any facility of any national securities exchange,
>
> "(a) To employ any device, scheme, or artifice to defraud,
>
> "(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> "(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security."

So far as Appellants' fraudulent scheme involves the purchase or sale of securities this Court and those of other Circuits have well established that persons such as Mrs. Connell have a cause of action for fraud. Her cause arises by implication from Sec. 10(b) of the Act and Rule X-10B-5 as above set forth.

Fratt v. Robinson (9 Cir., 1953) 203 F.2d. 627

Slavin v. Germantown Fire Ins. Co. (3 Cir., 1949) 174 F.2d. 799

Fischman v. Raytheon Mfg. Co. (2 Cir., 1951) 188 F.2d. 783

Kardon v. National Gypsum Co. (E.D. Pa., 1946) 69 F. Supp. 512

Speed v. Transamerica Corp. (D. Ct., Del., 1947) 71 F. Supp. 457

Robinson v. Difford (E. D. Pa., 1950) 92 F. Supp. 145, 149

Thiele v. Shields (Mar. 31, 1955, D. Ct. S.D.N.Y.) 131 F. Supp. 417, 419

Mills v. Sarjem Corp.(D. Ct., June 29, 1955) 133 F. Supp. 753

"The Prospects of Rule X-10B-5: An Emerging Remedy for Defrauded Investors", 59 Yale L. J. 1120, 1133

"Implied Liability Under the Securities Exchange Act", 61 Harv. L. R. 858.

As to that portion of the judgment declaring void and cancelling a series of notes and other instruments involved in the fraudulent scheme, jurisdiction of the District Court rests upon Sec. 29(b) of the Act (15 U.S.C. Sec. 78cc(b)).

Kardon v. National Gypsum Co. (E.D. Pa., 1946) 69 F. Supp. 512

Geismar v. Bond & Goodwin, Inc. (D. Ct., N.Y., 1941) 40 F. Supp. 876

Northern Trust Co. v. Essaneu Theatre Corp., (D. Ct., Ill, 1952) 103 F. Supp. 954

The only possible distinction so far as jurisdiction is concerned between the case at bar and Fratt v. Robinson, (9 Cir., 1953) 203 F.2d. 627 is that in the case at bar Appellants, in purchasing Mrs. Connell's securities also in the same single scheme and transaction acquired non-securities. Here it must be kept

in mind that although the resultant property taken from Mrs. Connell is perhaps different and several, such does not make several the acts constituting the single wrong.

For example, where smelter fumes damaged valuable timber located upon two non-contiguous parcels of land belonging to the same owner, a single tort was involved and likewise a single cause of action. Doak v. Mammoth Copper Mining Co. (Cir. Ct., Calif., 1911) 192 Fed. 748. Or where a plaintiff lost money gambling on 47 different occasions in a "bucket shop" the Court permitted the pleading of a single scheme and not 47 different causes of action. Boyce v. Odell Commission Co. (Cir. Ct., Ind. 1901) 107 Fed. 58. Likewise, where a wrongful attachment was made upon various and separately located pieces of property the Court ruled that no matter how numerous the items of damage if they all flowed from one wrong they were the subject of but one cause of action. Breard v. Lee (Cir. Ct., Calif., 1911) 192 Fed. 72.

We do not believe the fact that the Appellants fraudulently induced Mrs. Connell to sell both securities and non-securities in a single indivisible transaction effects jurisdiction; particularly where the involved securities were substantial in value and number. Certainly, Appellants are of the same opinion as they have not raised this point in their brief. We believe, however, it is worthy of discussion.

In the case at bar the primary relief sought is damages for the single wrong of Appellants in fraudulently inducing Mrs. Connell through a scheme to sell $124,180.09 worth of securities and non-securities. The single tort was a fraud which violated both the common law as well as the Act and Rule making unlawful fraud so far as the securities are concerned. The single tort cannot be dissected. In this single transaction the entire scheme; its fraudulent inducements and purposes as well as its "lulling" activities were directed as much to acquiring the securities as to the non-securities. The "lulling" activities which in part involved the return to Mrs. Connell of $26,730.95 pertained as much to the securities as to the non-securities.

We believe that Congress in enacting Sec. 10(b) of the Act and the Commission in promulgating Rule X-10B-5 had in mind and intended to outlaw fraud in respect to all sales or exchanges of securities. While the Act and Rule were directed broadly to securities and nothing else, it did not contemplate that those who dealt fraudulently in securities could evade the broad language and purpose of the Act and Rule through the simple expedient of comingling securities and non-securities in a single indivisible transaction.

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As is apparent in the case at bar, it is impossible for the transaction to be segregated, so as to grant

adequate relief in respect to the securities without regard to the non-securities. This would become crystal clear if complete rescission had been granted under Sec. 29(b) of the Act, as Mrs. Connell pleaded in one cause and could have elected had the Appellants not dissipated the "loot". The District Court with its unquestioned jurisdiction over securities would have been unable to grant rescission of the sale of the securities and not the non-securities. It is axiomatic that rescission of a transaction cannot be "piece-meal" -- its either the entire transaction or nothing. O'Keefe v. Hill (3 Cir., 1939) 105 F. 2d. 325; Weiskircher v. Volk (1905) 29 Pa. Super. 611; Williston on Contracts (Rev. Ed. 1937) Vol. 5, Sec. 1525; Black on Rescission and Cancellation (2nd. ed.) (1929) Vol. 3, Sec. 583, 584.

At the invitation of the trial Court the Securities and Exchange Commission appeared by brief amicus curiae sur motions to dismiss. The Commission supported the position of Mrs. Connell on the jurisdictional question. On page 11 of its brief the Commission said:

> "The fact that by this purchase defendants also acquired non-securities does not render Rule X-10B-5 inapplicable. So far as we know, this is the first action under Rule X-10B-5 which has involved such a combination purchase; and so there is no prior court ruling. The statute and rule, however, are literally applicable; and it is obvious that a contrary holding would afford a rather simple method for frustrating the purpose of the legislation. Were a fraudulent buyer of securities able to avoid

"liability under Rule X-10B-5 merely by purchasing a non-security from the seller at the same time, it is evident that the rule could easily be rendered meaningless. The Court, we feel, should have no difficulty in determining that the instant complaint does allege a violation of Section 10(b) and Rule X-10B-5 thereunder. Section 27 gives the Court exclusive jurisdiction to determine the recovery to which plaintiff may be entitled under the statute."

On the other hand, Appellants at page 20 of their brief rely upon Joseph v. Farnsworth Radio & Television Corp. (D. Ct., S.D.N.Y., 1951) 99 F. Supp. 701; affirmed in 198 F.2d. 883, in urging this Court to give a narrow construction to Sec. 10(b) of the Act, contrary to its prior holding in Fratt v. Robinson, supra. The point in that decision which prompted Judge Sugarman to express himself as quoted in Appellants brief was the lack of privity between seller and purchaser; a situation which does not exist in the case at bar. Nor, as Appellants contend, is the scope of Sec. 10(b) of the Act limited to "insiders". Birnbaum v. Newport Steel Corp. (2 Cir., 1952) 193 F.2d. 461, cert. denied in 343 U.S. 956, 96 L.Ed. 1356.

The "pendent" jurisdiction of the Federal Court is adequate to give it power to determine Appellee's cause respecting the non-securities which are comingled with the securities in this single cause for the single fraud.

It has long been settled that the Federal Court when presented with a federal question that forms the

ingredient of an original cause has jurisdiction of the complete case and may exercise its "pendent" jurisdiction to determine other non-federal questions of fact or law which are inextractably involved. Osborne v. President of the Bank of United States (1824) 9 Wheat 738, 822, 6 L.Ed. 204.

The case at bar, seeking damages arising out of the single fraudulent scheme and involving the Federal subject of securities as well as the non-federal subject of non-securities is precisely similar to the common situation of a plaintiff coming into a Federal Court and seeking damages in a single action for copyright infringement and unfair competition, both arising out of the same set of facts. There, the Federal copyright law is violated by the same acts which violate the common law concerning unfair competition. There, the Federal Court takes, as of right, the cause as to the copyright infringement and in exercise of its "pendent" jurisdiction determines simultaneously the non-federal facts and law involving the unfair competition. Just as "pendent" jurisdiction gives the Federal Court jurisdiction over unfair competition, so should it give the Court below jurisdiction over the fraud that caused Mrs. Connell to lose her non-securities along with her securities.

Armstrong Paint v. Nu Enamel Corp. (1938)
305 U.S. 315, 83 L.Ed. 195

Hurn Oursler (1933) 289 U.S. 238, 77 L.Ed. 1148

However, "pendent" jurisdiction is not alone confined to copyright and trademark cases, as prolific in this field, such decisions seem to appear. Leading in other fields is Siler v. Louisville & N. R. Co. (1909) 213 U.S. 175, 53 L.Ed. 753 where the Supreme Court held that a Federal Court had jurisdiction to determine whether an order of a state railroad commission violated the Federal Constitution, and having taken jurisdiction to determine that federal question (in a non diversity case such as here) it had "pendent" jurisdiction to determine the lawfulness of the order under state or local law.

This Court in Southside Theatre v. United West Coast Theatre (9 Cir., 1949) 178 F.2d. 648 recognized the jurisdiction of a District Court in an action for declaratory relief to determine not only the federal question of whether a particular contract violated the Sherman Act but also the non-federal question as to whether one of the parties had terminated the contract pursuant to its terms. Even the question as here presented as to whether or not Mrs. Connell's annuity and her three conditional sales contracts are securities within the meaning of the Securities and Exchange Act of

1934 is a substantial federal question justifying exercise of "pendent" jurisdiction to determine the remainder of the controversy -- federal and non-federal. Southern Pacific Co. v. Van Hooser (9 Cir., 1934) 72 F.2d. 903.

Some Courts have taken the view that the exercise of "pendent" jurisdiction is not mandatory but only permissible within the District Court's sound discretion. Strachman v. Palmer (1 Cir., 1949) 177 F.2d. 427, 12 A.L.R. 2d. 687; Fitzhenry v. Erie R. Co. (D.C.N.Y., 1934) 7 F. Supp. 880. If exercise of "pendent" jurisdiction in a proper case be discretionary, it becomes particularly appropriate for this Court to affirm the trial court's exercise of its discretion in taking hold of and deciding this entire, non-severable controversy involving a scheme to defraud Mrs. Connell of her entire wealth - securities and non-securities. Such discretion should not be disturbed on appeal. As Judge Clark so humanly expressed the practicality of exercising "pendent" jurisdiction in his dissenting opinion in Musher v. Alba Trading Co. (2 Cir., 1942) 127 F.2d. 9 at page 11:

> "If the roast must be reserved exclusively for the Federal bench, it is anomalous to send the gravy across the street to the State Court House."

Court said in Marshall v. United States,(9 Cir., 1944) 146 F.2d. 618:

> "...Direct evidence is rarely available to prove a fraudulent scheme or fraudulent intent. From the very nature of the offense, it must be inferred from the facts and circumstances of the situation in question. Clark v. United States, (9 Cir., 1942) 132 F. 2d. 538, 541; Gates v. United States, (10 Cir., 1941) 122 F.2d. 571, 575."

Nor, does a scheme to defraud necessarily end with the obtaining of a profit as the scheme is often continued to "lull" the victim into a sense of security or inaction and to delay detection of the fraud. Use of mails to carry out "lulling" activities is sufficient for jurisdiction. Marshall v. United States, (9 Cir., 1944) 146 F. 2d. 617, 621; Brady v. United States, (9 Cir., 1928) 26 F.2d. 400, 402.

Promises made and representations as to future events are competent evidence in proving a scheme to defraud. United States v. Grayson (2 Cir., 1948) 166 F.2d. 863, 866. Gross exaggeration of opinion respecting the value of land exceeds "puffing" and constitutes fraud. Holmes v. United States (8 Cir., 1943) 134 F.2d. 125. Even though a business be lawful in form and appearance such cannot be furthered by fraudulent representations. Stephens v. United States (9 Cir., 1930) 41 F.2d. 440, 445. "It is astonishing how many credulous investors there are in the world" Byron v. United

States (9 Cir., 1919) 259 Fed. 371. The fact that the scheme would not deceive one of ordinary intelligence does not relieve the wrongdoers. Tucker v. United States (6 Cir., 1915) 224 Fed. 833, 837.

Jurisdiction is satisfied if any act or any transaction of the offending fraudulent scheme occurred in the Western District of Washington (i.e. Seattle or Vancouver, Washington) Sec. 27 of Act (15 U.S.C. #78aa); Robinson v. Difford (D. Ct., Pa., 1950) 92 F. Supp. 145. Neither logic nor the authorities support a proposition that the entire scheme must be proven to have occurred entirely within the confines of the Western District of Washington. Without laboring our previous "Statement of the Case" we pin-point several of the most important acts of Appellants which occurred in the Western District of Washington.

First, Errion sought out Mrs. Connell at her Seattle home (T. 106) after which he called there on numerous occasions (T. 126) and in fact made most, if not all, of his fraudulent statements to her in her home (T. 720, 176). Errion took Mrs. Connell's securities and gave her his promissory note (Ex. A-3) in Seattle after which Amy Errion sold the securities on her own account in Seattle (T. 94); getting the money and converting it into cashier checks in Seattle for delivery to Errion. (T. 97, 665). Amy Errion typed documents for the transaction in Mrs. Connell's home at Errion's bidding (T. 161),

Dwight Holdorf presented the receipt document dated at "Seattle, Washington" (Ex. A-5) purporting to represent the principal transaction and delivered the deed to the tidelands to Mrs. Connell in her home (T. 221, 239). Errion arranged in Seattle for a Mr. Olson to sell the "Bogardus" contract (T. 484) and the "Rankin" contract (T. 492) as had been taken from Mrs. Connell. Violet Kellerstrass sold the residential property at 811 14th Avenue North, in Seattle and converted the funds into cashier checks in Seattle (T. 567) and also made a deposit in Holdorf's bank account in Vancouver, Wash. (Ex. 25). Dwight and Opal Holdorf at Errion's direction employed Seattle attorneys to create the Holdorf Oyster Corporation and then turned the stock over to Errion in Seattle (T. 676, 684, 790). Even during "lulling" activities, Errion conversed with Mrs. Connell at Seattle although by then he was staying mostly away from there and some transactions with Mrs. Connell occurred in Portland, Ore.

It is difficult for us to see how Appellants could have the temerity of contending that no act or transaction violative of the Securities and Exchange Act or Commission rule occurred in the Western District of Washington. The conspirators all came fleetingly from Oregon to Seattle; perpetrated the fraud in Seattle; consummated the purchase and sale in Seattle; liquidated

the "loot" in Seattle and then retired to Oregon and conducted their "lulling" activities, in many instances, by remote control.

Action is NOT barred by either the Statute of Limitations or Laches.

The applicable statute of limitations is Rem. Stat., Sec. 159(4) of the State of Washington which provides that in cases of fraud the action must be commenced within three years from the time of discovery of facts constituting the fraud. Fratt v. Robinson (9 Cir., 1953) 203 F.2d. 627; Osborne v. Mallory (D. Ct., N.Y., 1949) 86 F. Supp. 869.

The trial Court found as a fact that Appellants had conducted "lulling" activities which had prevented Mrs. Connell from discovering facts which would have revealed to her the fraud which she did not discover until well within three years prior to the commencement of her action and that she was not in fact quilty of laches (T. 134, Vol. 2).

The Court's finding is well supported by the evidence. Although the sale of securities was consummated on October 19, 1949 and this action not commenced until three years, ten months and 12 days later, Mrs. Connell's normal opportunity of discovering the fraud within ten months and 12 days following such sale was prevented and frustrated by the "lulling" activities of

the conspirators.

The very nature of the scheme frustrated an early discovery. She and Errion were supposed to await outcome of the condemnation action by the Port of Coos Bay; expected to be finished within a year (T. 113). As Mrs. Connell testified (T. 132):

> "We just held our breath until this suit was to be finished."

On top of the very nature of the scheme is the fact that from the very beginning Errion told Mrs. Connell to stay away from Coos Bay, Ore. so she wouldn't upset the apple cart (T. 133). Coos Bay, Ore. was the only place where Mrs. Connell could have gone to find out the truth about the worthlessness of her newly acquired "Oyster" lands. It was not until the summer of 1953 that she actually got down to Coos Bay, Ore. to inspect the lands (T. 193). Errion also told her at the very beginning not to interfere with the "plan" by talking with others about the transaction; particularly lawyers. (T. 223, 249). Mrs. Connell believed implicitly in Errion (T. 110). It was not reasonable to expect this aged widow residing in Seattle to make any kind of an investigation immediately after the transaction or during the early part of the scheme.

Of course, at Errion's suggestion (T. 117), Mrs. Connell and Amy Errion took a sojourn to southern California commencing in July of 1950 and extending until

Christmas Eve of 1950. Being in southern California with Amy Errion for the last half of 1950 certainly hampered, if not prevented, any investigation that Mrs. Connell could have made even had she had reason to become suspicious. The Court found that this southern California trip was for the purpose of hindering Mrs. Connell from discovering the true facts concerning her transaction (T. 123, Vol. 2). While no defendant directly admitted that such was the purpose of the trip, the Court was fully justified in drawing such inference from the evidence and so finding.

The first time it could be said that Mrs. Connell should have undertaken to investigate and learn the truth of the transaction was in Los Angeles on December 14, 1950 when Errion first advised that the condemnation action of the Port of Coos Bay, had been dismissed. However, that date is well within three years next preceeding this action which was filed August 31, 1953.

It is suggested by Appellants in their brief that Mrs. Connell should have been put on inquiry when she took Errion's promissory note (Ex. A-3), believing it a receipt, and that had she shown it to anyone, the document could have been explained to her and she be alerted to the probability of fraud. Of course, Appellants overlooked mentioning that this promissory note dated September 12, 1949 was promptly taken back from her by

the conspirators on or before October 19, 1949 (Ex. A-5). The conspirators treated the note as a receipt, as Mrs. Connell in the first instance had understood and she never had possession of the note long enough to show it to anyone.

Appellants do not go far enough when relying upon In Re Sackman's Estate, 34 Wn. 2d. 864, 210 P.2d. 682, which merely enunciates a familiar principle of law that discovery of fraud dates from when a victim by the exercise of due diligence could have discovered the fraud; not when actually discovered at a later date.

Another equally important and pertinent principle is that action taken by defendants to hinder or impede discovery tolls the time when a plaintiff is charged with constructive knowledge of the fraud. This doctrine of fraudulent concealment is recognized by the Supreme Court of the State of Washington. In Johnston v. Spokane R. Co. (1919) 104 Wn. 562, 177 P. 810 the Court said: (p. 570)

> "And mere silence is not sufficient concealment of fraud to interfere with the running of the statute of limitations where the facts are readily ascertainable. There must be some hindrance or impediment interposed or some fraudulent concealment by the defendant to have that effect. Sackman v. Campbell, 15 Wash. 57, 45 Pac. 495; Kline v. Galland, supra." (53 Wash. 504, 102 P.440)

Likewise, the District Court for the Western District of Washington made the same observation of

Washington law in Johnson v. Chicago N. & St. P. Ry. Co. (D. Ct. Wash. 1915) 224 Fed. 196 at page 201:

> "It is fundamental that where plaintiff is prevented from bringing action through fraud, concealment, or deceitful conduct of the defendant, the bar of the statute does not operate until discovery."

Any statement, word or act which tends to the suppression of the truth, renders the concealment fraudulent. Hickok Producing & Development Co. v. Texas Co. (5 Cir., 1942) 128 F.2d. 183. Acts of concealment need not be subsequent to the accruing of the cause of action but may be coincident or even prior to it provided there is a relation or design to consummation of such acts. Overfield v. Pennroad Corp. (3 Cir. 1944) 146 F. 2d. 889. For example, where a defendant misrepresents the value of land sold to a plaintiff and at time of sale induces the plaintiff to keep the transaction a secret, it has been held that such action is fraudulent concealment sufficient to toll date of constructive discovery. Wax v. Cutting (1849) 20 N.H. 187 (memo in 173 A.L.R. 582, at 609). Where a defendant subsequently falsely re-assures plaintiff as to quality of land sold such is sufficient affirmative concealment to prevent the Statute of Limitations from running. Al Parker Securities Co. v. Owen (Texas Com. App., 1928) 1 S.W. 2d. 271.

Whether Appellants in the case at bar made affirmative statements or acts which impeded or prevented

Mrs. Connell from earlier discovering the fraud is a question of fact to be determined by the trial Court from all of the surrounding circumstances and personal characteristics of the parties involved in this particular case. Cornwall v. Anderson, 85 Wn. 369, 148 Pac. 1. The crafty and experienced Appellants versus a 74 year old widow; representation in Seattle of "Oyster" land in Coos Bay; nature of scheme; advised to stay away from Coos Bay; advised not to talk about the transaction with others; and a six months trip with Amy Errion to southern California fully support the trial Court's findings No. 28 of the ultimate fact that Mrs. Connell did not discover or have reason to have discovered facts that would reveal the fraud until well within the three year statutory period.

Such finding as made by the trial judge who listened to the testimony and observed the witnesses should not now be disturbed on appeal. Finding No. 28 (T. 134, Vol. 2) stating the ultimate fact of time of discovery stands in mutual support with Findings Nos. 19 and 21 (T. 123, Vol. 2) pertaining to some of the early "lulling" activities or affirmative acts of concealment.

Appellants are in error in contending that the trial Court's findings are not supported by the evidence.

In contending that the findings are not supported

by the evidence, Appellants are content merely to assert that Mrs. Connell's case is predicated upon common law fraud; that fraud is "odious" (as Mrs. Connell has discovered) and that it must be proven by clear and cogent evidence.

In no respect have Appellants undertaken their task of pointing out specifically where or how Mrs. Connell has failed to sustain her burden of proof. It is not incumbent upon either this Court or Mrs. Connell to pick up Appellants' "laboring oar".

As to burden of proof a violation of Sec. 10(b) or Rule X-10B-5, even if short of the common law criteria of fraud is sufficient to establish Mrs. Connell's case so far as it relates to securities. Norris & Hirschberg, Inc. v. S.E.C., (D.C. Cir., 1949) 177 F.2d. 228; Charles Hughes & Co. v. S.E.C., (2 Cir., 1943) 139 F.2d. 434; Hawkins v. Merrill, Lynch, Pierce, Fenner & Beane, 85 F. Supp. 104. Since the non-securities are so inextractably comingled with the securities in this single fraud we believe the same burden of proof would suffice for them as well.

In any event, we do not see it necessary for this Court to determine the niceties of the two criteria of proof as we are convinced that the findings of the trial Court are supported by clear and cogent evidence which shows a fraudulent scheme that offends the common law

order to make statements as made, in the light of the circumstances under which they are made, not misleading can constitute fraud apart from any Rule X-10B-5. Equitable Life Ins. Co. v. Halsey, Stuart & Co., 312 U.S. 410, 668, 85 L.Ed. 920, 929, reversing 7 Cir. 112 F. 2d. 302.

In a case involving conspiracy and a fraudulent scheme, such as we have here, the burden of proof can, as is often necessary, be met by circumstantial evidence. Such evidence is not only sufficient but in most cases it is the only proof that can be adduced. Rea v. State of Missouri (1873) 84 U.S. 532, 21 L.Ed. 707 at page 710; Wynne v. Boone (D.C. Cir., 1950) 191 F.2d. 220 at page 222. The inference of fraud is often gathered from a chain of circumstances and common sense. Connolly v. Gishwiller (7 Cir., 1947) 162 F.2d. 428, 433. It is also well established that conspiracy can be established by circumstantial evidence. Borgia v. United States (9 Cir., 1935), 78 F.2d. 550, 555; Patti v. United States (9 Cir., 1927) 17 F. 2d. 562.

The case as to each of the Appellants must be measured with the view that they all acted in concert in carrying out a scheme for the unlawful purpose of defrauding Mrs. Connell.

As to AMY ERRION, she acted as Errion's secretary and typed pertinent documents (T. 161); took Mrs. Connell

to southern California for six months at Errion's bidding (T. 117); sold the corporate securities of Mrs. Connell in Seattle (T. 94, 664); reduced the proceeds to cashier checks and gave to her husband (T. 665); and kept $122.61 of the proceeds herself (Ex. 67; T. 668). In Los Angeles she paved the way by giving Mrs. Connell measages from Errion and was present when he induced her to sign the "Indenture of Lease" (T. 123). When Errion held business meetings almost every morning in his Portland apartment, Amy participated.(T. 284).

VIOLET KELLERSTRASS, as sister of Errion, was dependent upon him for support; lived in an adjoining apartment with companionway between and shared a single telephone (T. 572, 519). She took messages, wrote letters and kept records for Errion (T. 470, 284); opened a safe deposit box in 1949 in her name with Errion having a power of attorney to use (T. 576); and maintained a joint bank account in Portland with Errion and his money (T. 565, 585). When the property of Mrs. Connell's at 811 14th Avenue, Seattle was obtained, she took title in her name to conceal true ownership and "fronted" for the sale of same in Seattle (T. 566). She took $11,400.00 net purchase price; converted it into cashier checks; converted the cashier checks into further cashier checks and then distributed all of it in a confusing series of deposits partly to Holdorf's account

in Vancouver, Washington bank and partly to the joint account which she had with Errion in a Portland bank. (Study of Ex. 35, 18, 13, 14, 15, 19, 20, 21, 22, 28).

Appellant C. W. WILLIAMSON came into the scheme as a "front" in December of 1950 to effect the "lulling" of Mrs. Connell. His actions clearly bring home the unlawful purpose of the entire conspiracy. Although on May 31, 1953 he wrote Mrs. Connell (Ex. 79) to effect that Errion had nothing to do with his "Oyster" business; that he was unable to plant "oysters" as represented because of silt damage; he nonchalantly admitted on cross-examination that he had signed the "Indenture of Lease" at Errion's bidding; he had never seen the "oyster" land; never intended to cultivate oysters on it; knew nothing himself about the claimed silt damage; had no money to buy such land from Mrs. Connell; and that the $22,500.00 which he forwarded to Mrs. Connell over a period of time to purchase part of such land came exclusively from Holdorf or Errion's alter ego, National Forest Products Corp. (T. 1043-1052). The exhibits show that each time he received money to pass on to Mrs. Connell, he retained part of it; $750.00 on June 14, 1951 (Ex. 58, 59, 60, 52) and $1,000.00 on January 15, 1952 (Ex. 46, 12). Without the knowingly false participation of C. W. Williamson, the entire fraudulent scheme would have exploded in December of 1950.

Appellant Errion was, of course, the center of the fraudulent scheme; he took the lions share of the "loot". Appellee's Statement of the Case amply shows his direction, organization and leadership in the fraudulent scheme.

In conclusion, we scarcely have to point out that even if Violet Kellerstrass and C. W. Williamson came into the conspiracy after the others and even after the principal transaction they are none the less "full fledged" conspirators and liable with the rest of them. Bogy v. United States, (6 Cir., 1938) 96 F.2d. 734, 740.

Mrs. Connell's part in relation to Port of Coos Bay condemning the "Oyster" land did not place her in pari-delicto with Appellants; hence no defense to this action.

We come now to the contention made by Appellants on page 31 of their brief to the effect that Mrs. Connell was in pari-delicto with Appellants in connection with their plan to "fix" values to detriment of the Port of Coos Bay. Our views coincide with those expressed by the trial Court in its oral opinion (T. 1068 at 1076).

Obviously, Mrs. Connell went passively along with the "plan" as outlined by Errion to "establish values" so that the Port of Coos Bay would be required to pay $1,200.00 per acre for the property which was

only worth $100.00 per acre, otherwise Mrs. Connell would not have been defrauded. Such passive consent does not place Mrs. Connell in pari-delicto with Appellants.

Three significant facts appear: First, Mrs. Connell thought she was exchanging for her securities, land worth $1,200.00 per acre; only the Appellants had reason to know it was worth less than $100.00 per acre. Second, although Mrs. Connell gave $124,180.09 worth of securities and other property for 125 acres of "Oyster" land reputedly worth $150,000.00, leaving the inference she was in the "plan" to make a profit, the amazing fact is that Appellants took back from Mrs. Connell her $4,282.00 promissory note (Ex. 76, T. 980) for the difference in value between her securities and $150,000.00. Third, the Port of Coos Bay voluntarily dismissed the condemnation action which they had commenced and no damage was suffered by the Port or anyone unjustly enriched.

A victim of a fraudulent scheme is not barred from seeking back that which was taken, merely because the scheme may have involved the victim in a plot to defraud another. Stewart v. Wright (1904) 130 Fed. 905, 918, affirmed in 147 Fed. 321.

The case of Paddock v. Todd, 37 Wn. 2d. 711, 225 P.2d. 876 relied upon by Appellants is distinguishable from the case at bar because the plaintiff in that case by signing a false affidavit in a scheme with the

defendant had actually defrauded a corporation and benefited by the scheme.

As a general proposition, one who has entrusted money to another for an illegal purpose may recover it back so long as it has not been so used. Okeechobee County v. Nuveen (5 Cir., 1944) 145 F. 2d. 684, cert. denied in 324 U.S. 881, 89 L.Ed. 1432. See, also: "Money Entrusted for Illegal Use", 8 A.L.R. 2d. 307.

Many cases permit a fraud victim to recover by finding that although the victim might have been in delicto, in an agreement to defraud a third person, such victim was not necessarily in pari-delicto. Perhaps the most pointed decision of all is the 1857 decision of Pinckston v. Brown, 56 N.C. (Jones Equity Vol. III) 494 wherein an aged widow-mother was threatened to be sued on a note. She had an adult son who she relied upon very heavily. The son concocted the scheme of taking over all of his mother's assets in trust for all creditors except the holder of the note. The son had the mother list fictitious assets. The North Carolina Court in permitting the mother to recover back her property from the son's administrator (he having died) held that while the mother was in delicto in scheming to defraud the note creditor she was not in pari-delicto. The Court said:

"Relief is not granted where both parties are truly in pari-delicto. For enforcing, however, this rule, it is not sufficient that both parties are in delicto, concurring in the unlawful act; they must stand in pari-delicto, for there may be other, and very different, degrees their guilt. Judge Story, in the 1st vol. of his Equity, section 300, says 'one party may act under circumstances of oppression, imposition, hardship, undue influence or great inequality of condition, or age, so that his guilt may be far less in degree than that of his associate in the offense.' In such cases the Court will grant relief in favor of a plaintiff who was particepts criminis as not being in pari-delicto. Such is the decision of the master of the rolls in Osborne v. Williams, 18 Ves. 382. The master observes, 'Courts of law and equity have held that two parties may concur in an illegal transaction, without being deemed in all respects in pari-delicto.' I consider this agreement as substantially the mere act of the son."

Trial Court soundly exercised its discretion in refusing to further delay Mrs. Connell's day in Court because of Errion's "battle fatigue".

Collateral to the trial of this cause was the tactical battle of Mrs. Connell, age then 79 in seeking to get her day in Court in face of Errion's many delays obtained on basis of his alleged diabetic condition which he had since 1950 and his recently acquired "depression" described as comparable to "battle fatigue".(T. 76). This action was commenced August 31, 1953 and went to trial on November 3, 1954.

We have of record that prior to the trial, Errion could go down to his doctor's office; was seen in various places (T. 100, Vol. 2); met people in hotels; drove

his car and engaged in business other than litigation (T. 80). He just couldn't seem to get to Court. His psychiatrist, Dr. Herman A. Dickel of Portland, Oregon, testified that he was treating Errion for "depression" between April 15 and just prior to the commencement of the trial on November 3, 1954. He testified that although Errion's condition had improved, he, Dr. Dickel, could not state that Errion had made sufficient improvement to allow him to let Errion enter into any business activity (T. 74). As to this, the doctor frankly admitted he could not give an opinion and his expression would be more or less a "guess" as he had been unable to evaluate Errion's condition sufficiently to express an opinion (T. 72). When examined by the Court, Dr. Dickel was unable to say when, if at all, Errion's condition would be such as to permit him to appear at the trial (T. 81).

The trial Court was also faced with the consideration of according to Mrs. Connell, a 79 year old widow, her day in Court. While the prospect of attending trial was giving Errion "battle fatigue" the delay in not getting into the battle was affecting Mrs. Connell's health. By affidavit dated September 7, 1954 and presented to the Court, Dr. H. M. Landberg, a Seattle psychiatrist described Mrs. Connell's condition of health in part as follows: (Clerk's Item 133)

"The following is a summary of a psychological evaluation of Mrs. Marguerite Connell. The patient was seen on two occasions for approximately three hours. It appears that Mrs. Connell has a very keen and alert mind, with no particular evidence of mental deterioration. Her recollection of both past and recent events is quite good. Emotionally, it is found that she is in an extremely acute panic state which is super-imposed upon a chronic state of severe anxiety.....

"Two Factors are now producing her acute panic episodes which consists of a general mood of a hypo maniacal state, excessive verbosity, insomnia, extreme anxiety or nervousness and the unconscious desire to do anything and everything possible from having to possibly face the horrible reality with which she may be confronted. The above mentioned factors are, first, her having to realistically face being involved with some unscroupulousness of mankind and secondly the possibility of having to live in dire poverty. The degree of her emotional tenseness at present is exceedingly extreme and it is strongly urged and recommended that her present ordeal be culminated as rapidly as possible so as to alleviate the exciting causative factor and thereby possibly prevent her total collapse. It is quite obvious and apparent that she cannot much longer endure and exist in her present extremely turbulent emotional state."

Faced with the "battle fatigue" of Errion -- degree of which was highly uncertain and at best a "guess" on the part of his psychiatrist on the one hand, and, on the other a 79 year old widow with a chronic state of severe anxiety, who sought for over a year to get her day in Court, the trial judge in the exercise of his sound discretion refused to continue the trial or vacate the trial date. In fact, such decision of the trial judge was the only one which could be made in view of Errion's psychiatrist being unable to express an opinion as to when Errion could attend trial. The fairness

of the trial judge was further exemplified when he kept the door open for Errion's appearance at the conclusion of the taking of evidence on November 19, 1954 (T. 1057) and again on December 29, 1954 when the case was orally argued (T. 1067). It is significant that no move for Errion to appear was made pending motions for new trial filed January 26, 1955 and denied February 9, 1955.

The Trial Court did not err in denying motion of Violet Kellerstrass to quash service of summons.

Appellant Violet Kellerstrass was served with summons and complaint at her ground floor apartment at 709 S. E. 16th Avenue, Portland where she resided with her brother, Fred Errion. Service was made by an experienced Deputy Sheriff of Multnomah County, Oregon who was specially appointed by the Court in this case to serve process (T. 36-38, Vol. 2). Process was served at about 7:30 P.M. on September 9, 1954.

As to manner of service, Sheriff Collacutt testified that he came to the front porch of her apartment; saw and recognized Mrs. Kellerstrass in the apartment; saw her step back into a back room as her brother, Fred Errion came to the open but screened door. When Fred Errion denied Mrs. Kellerstrass was in the apartment, he pitched the papers into the apartment through a hole in the delapidated screen door. He also verified that Fred

Errion lived in the same apartment and was over the age of 21 years (T. 544).

Violet Kellerstrass testified that she and her brother Fred Errion resided in the apartment; that during the evening in question she had gone to the apartment above to visit a friend and was not in her apartment until 10:00 P.M. at which time she saw the "papers" on the floor of the front room. She then testified she never picked up the papers or read them; didn't even "peek" at them; and that they were still on the floor. (T. 527-529).

The only objection which Appellant Violet Kellerstrass made at time of trial was that personal service had not in fact been made (T. 558). It is the only point urged on this appeal (Appellants' brief p. 34). Under the law of the State of Oregon, service is sufficient if the process is left at the residence of the party with a person of the family over 14 years of age. OCLA, Sec. 1-605(6). The Federal rule provides that summons and complaint may be served upon defendant "personally or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion." Rules of Civil Procedure. Rule 4(d). This was done. Furthermore, Rule 4(h) of the Rules of Civil Procedure provided that the Court at any time in its discretion may permit amendment of proof of service. This was in effect done by the Court

accepting the testimony of Sheriff Collacutt.

No prejudice resulted as no default was taken; it was stipulated that the answer of Errion be considered the answer of Violet Kellerstrass and she was present and testified at the trial.

SUMMARY AND CONCLUSION

With fast talk, ingenious false representations and a scheme every bit as much a breach of the common law as of Sec. 10(b) of the Act and Rule X-10B-5 of the Commission, Appellants induced Mrs. Connell to sell all of her securities and other property worth $124,180.09 for 125 acres of tidelands worth less than $12,500.00 to her damage in amount of $83,077.49.

The District Court had jurisdiction over the cause and the Appellants to find the fraudulent scheme and award the judgment.

The action is not barred by the three year statute of limitations nor by laches.

The judgment of the District Court is supported by the Findings and the Findings by the evidence.

Mrs. Connell was in no way in pari-delicto with Appellants.

Judge William J. Lindberg who heard the cause in the District Court did not abuse his discretion in not

letting Errion postpone Mrs. Connell's day in Court indefinitely because of his alleged "battle fatigue" that arose after this action was commenced.

The motion to quash summons served on Appellant Violet Kellerstrass was properly denied. She suffered no prejudicial error in being held in the case after such motion was denied.

In the interest of justice, the judgment of the trial court should be affirmed with costs to Appellee.

Respectfully submitted,

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PROCEEDINGS

THE COURT: Well, Gentlemen, I believe I can give my opinion on the question of liability now. I reviewed my notes and I have studied the briefs and, of course, formed impressions as the evidence went in.

It is clear to me from the evidence as disclosed here that there has been a fraud perpetrated upon the Plaintiff, Mrs. Connell. It is clear that Mr. Errion was the principal perpetrator of that fraud in the first instance.

It appears to me, however, that when consideration is given to the development of the Holdorf Oyster Corporation and the transfer of these lands to Mr. Holdorf and his wife and to the corporation, the giving of a mortgage without value, the placing - the giving of a deed, placing revenue stamps on it to give indication of some - of an actual consideration by and participation of Mr. Holdorf in the original negotiations with Mrs. Connell, that establishes to my mind the fact that there must have been some understanding, tacit though it may have been, on the part of Mr. Holdorf and between Mr. Holdorf and Mr. Errion, that this was a fraud that they were attempting to secure properties from Mrs. Connell, and securities, which I believe was all part - the securities, first - was all

a part of the transaction to obtain these properties and to give her in lieu thereof oyster lands of little value, or purported oyster lands.

While Mr. Errion, who apparently is a fantastic person, endowed with tremendous faculties and ability of persuasion - while the Court hasn't had the advantage of seeing him or hearing his side of the case it is obvious that he was able through his magnetic personality and charm and persuasiveness, whatever it may be, to make Mrs. Connell, and apparently in other instances such as the Skene case, believe that he was reliable and that he had land worth something and that he had a program whereby they could realize the value of their property in cash and possibly more in a short time through a proposed condemnation action and while he, Mr. Errion, was the principal perpetrator, it is difficult for the Court to believe that a man, unschooled perhaps, and as young as Mr. Holdorf indicates he is, couldn't have understood that this sale of oyster land which he participated in and helped formulate was - this whole scheme was - misrepresented and fraudulent and, therefore, I think there was at that time a tacit understanding between them and as Counsel know conspiracy need not have been a written or an oral agreement. Conspiracy can develop by - with lack of that. It may be inferred. A common course of action

is sufficient, and participation in it, which there certainly was on the part of Mr. Holdorf and Errion at the outset, not only in the Connell matter by practically at the same time in the Skene matter.

Therefore, it would be the Court's finding that there did exist a conspiracy between Mr. Holdorf and Mr. Errion to defraud Mrs. Connell.

When it started, of course, I know not. That is not necessary. It was in existence, I think, at the time Mr. Errion and Mr. Holdorf negotiated this first sale of the contract in August or July or thereabouts; completed, in part, as far as the transfer of Mrs. Connell's property, in October.

Following the matter down through the course of the other Defendants, I think the wife, Mrs. Holdorf, became a part of that conspiracy, and while it is true that the many acts done by Mrs. Holdorf and Mr. Holdorf were and could be by themselves innocent actions, when they are considered in connection with the course of this whole transaction, the fact that certain actions were taken, such as the incorporation and the signing by Mrs. Holdorf of the papers in that connection, and the issuance of stock and the transfer of stock then to Mr. Errion without being entered on the records, and the witnessing of the contracts involved, the participation of Mrs. Holdorf on a later occasion when the

mortgage was given on the Mount Helen property and then the note endorsed, those are things, a combination of circumstances and actions over a period of time, which would indicate more than innocent participation of one performing administerial acts. Mrs. Holdorf was not performing these acts as a wife of a Defendant, Holdorf but was performing them as an active officer of the corporation and one engaged in this whole business enterprise and certainly over the whole course of this period she must have had some knowledge, and the Court so finds, of this whole scheme and participated in it with such knowledge.

As to Mrs. Amy Errion, there again we have her performing acts which in some instances are innocent enough and under some circumstances might be considered laudable, such as entertaining and visiting Mrs. Errion.

One married to one such as Mr. Errion, again you form an impression of him from testimony in the case not having the benefit or advantage of seeing or hearing him, certainly a wife of such a man must have had some idea that he was engaged in some rather fantastic scheme or promotion. It seems from the evidence that she has participated in this transaction not only in a casual way but in a very essential fashion, it seems to me.

She originally took delivery of some securities and took them to Merrill-Lynch and had them sold and she was present on occasions when there were meetings between Mrs. Connell and Mr. Errion. That is, when they were - they may have been social affairs but nevertheless on those occasions it would appear that mention was made of these transactions, and particularly in the early days, in the Summer of 1949. Later on, Mrs. Errion was with Mrs. Connell in California. I think it is reasonable inference to believe that that trip to California was part of a scheme to, or program to, keep Mrs. Connell from suspecting the fraud that had occurred and was continued.

So, I believe, likewise, Mrs. Amy Errion was a part of the conspiracy and participated with knowledge.

Of course, in these conspiracy cases, as the courts have so many times held, you can not secure evidence of specific - could not secure direct evidence of the conspiracy. Conspiracies are not spelled out or written out. They are so many times undisclosed and they have to remain such or there would be no realization of their purpose. Therefore, it is a common case where you have nothing other than circumstances, such as happened in this case, which are to my mind conclusive of the existence of a scheme and conspiracy to defraud.

Likewise, the situation as to Williamson. The story on the stand seemed to me to be rather almost unbelievable to think that a man would get into the oyster business having looked at oyster beds on the Atlantic Coast at one time and having come out here and heard about it and undertakes an agreement such as here seems to me to be almost unbelievable. He certainly entered into this agreement and carried along with it, and indicated, as Counsel for the Plaintiff stated, in a letter written that he had intended to develop the oyster lands and had failed to do so because of silt and at that time he hadn't been down there, as I recall the evidence, and received the money from Mr. Holdorf to make the payments under the contract, all of which indicates a design on the part of everyone who participated in it of keeping Mrs. Connell from learning just how she had been swindled.

Perhaps they had in mind that she might not live long enough to bring them to justice. The Court doesn't intend by that statement to make a finding of such but in speculation that might have been a thought that crossed their minds.

As to Mrs. Kellerstrass, I recall her statements on the stand and her attitude and response. It is rather difficult to reconcile the testimony she gave with one who undertook the sale of this property on

Twelfth Avenue, or Fourteenth Avenue. She was a sister and participated with Mr. Errion and engaged in this program and must have had knowledge. She couldn't have undertaken the sale and come up here and secured the funds and sign the instruments and secure the cashier's checks and divide them among the various persons without having some knowledge of this whole thing and, therefore, she likewise, I believe, was a part of the conspiracy.

Now, the fact that Mrs. Connell on another occasion testified as she did in what is known as the Kinel case that she on this occasion loaned some money when she gave her securities to Mr. or Mrs. Errion and that it was a separate transaction - or that was the effect of her testimony - and the transaction she had with Holdorf, certainly that does tend to impeach her testimony and it might be such as would discredit her as a witness. On the other hand, when you look at this whole transaction it seems apparent that Mrs. Connell was completely sold, so to speak, on Mr. Errion and was willing to accept his statements without much challenge.

The mere fact that she would go into this transaction indicates the persuasive powers of this man and she went down there and he talked with her and while

he didn't tell her what to say I think she was so under his influence that she testified in that respect because she didn't fully appreciate what the circumstances were.

So, I can not on that testimony discredit Mrs. Connell's testimony, particularly when the whole transaction seems to be borne out by other - by facts as they are disclosed, not by testimony but by transactions as they unfold, and I can't help but believe that the Skene transaction serves to establish the pattern and also the intent of Errion and Holdorf in this transaction.

Coming to the, and likewise as to the, impeachment of Mr. Holdorf. Certainly he was impeached. His story on the stand was completely at variance with certainly a large portion of the testimony given in the deposition.

He told the Court he was absent from the court room because of an ulcer condition. I can't help but believe that when he testified here on the stand that day he was attempting to make a clean breast of it and when the Court review's some of that testimony in the deposition I can well understand how he might be suffering from ulcers in view of the utter contradictory statements made.

So, while Mr. Holdorf's testimony isn't to be relied on because it is certainly impeached, other

circumstances would seem to cause the Court to give credit to the testimony as he gave it on the stand.

As to the theory of the defense is peri delicto: Of course, it is wrong and unlawful to establish false values, or transactions other than bona fide transactions to establish the value of property under condemnation proceedings. Possibly Mrs. Connell was wrong in some degree. It is questionable whether she knew about that, however, and certainly the transaction wherein she was giving up, whether it was 113 thousand or 115 thousand or 120 thousand or 150 thousand dollar property, whatever the value, she was giving a very substantial amount of property for, what it now develops, was worthless, or almost worthless, oyster land, as the evidence shows. So, she was not engaging in a wrong, at least at that time, and as Counsel stated and argued in the brief, the condemnation action involved was dismissed. So therefore, there was no wrong committed other than possibly a morally wrong action in that it resulted, if completed, in some irregularity at least. However, it did not happen and I don't think, even if the Court were to assume there was some irregularity or unlawfulness on the part of the conduct that it was such as to deprive the Plaintiff of her right of action

in this case and that Court does not recognize that that is an available defense in this case.

I believe I have covered all the --

MR. WHITE: How about Holdorf Oyster Corporation?

THE COURT: The Holdorf Oyster Corporation, of course, I think being an involved corporation, is an instrumentality and liable and the Court will also find them liable.